90-1624

No. _____

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PALOMAR MOBILEHOME PARK ASSOCIATION, a Limited Partnership,

Petitioner,

vs.

THE CITY OF SAN MARCOS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?

2. Is there a violation of substantive due process under local rent controls for mobilehome parks, which do not provide for vacancy decontrol, where the effect of the ordinance is to merely transfer the value of the right to occupy at a reduced rate from the parkowner to the departing tenant, and in no way protects the present tenants in their

tenancy from rent increases or decreases, and increases the cost to incoming tenants by the amount of the "premium" paid by said tenant to the departing tenant for the right to occupy at a reduced rate?

3. Since the federal right or claim does not ripen until the state has denied just compensation, did the federal claim even exist at the time the state courts purported to dispose of it?

4. Does a federal "as applied" taking claim arise at the time of the passage of the rent control ordinance or sale of the coach for a premium, such that new federal claims, arising after completion of state court proceedings, are now ripe for decision by the federal district court?

LIST OF PARTIES

The caption of the case contains the names of all parties to the proceedings in the state court.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PALOMAR MOBILEHOME PARK ASSOCIATION,
a Limited Partnership, Petitioner

vs.

THE CITY OF SAN MARCOS, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Petitioner, PALOMAR MOBILEHOME PARK ASSOCIATION, prays that a writ of certiorari issue to review the decision and judgment of the Fourth Appellate District, Division One, Court of Appeals for the State of California, filed on February 6, 1991 in the case of Palomar Mobilehome Park Association v. City of San Marcos, 4th Civ. App. D011484. That

judgment and decision finally affirmed the order of the Superior Court of San Diego County, California, dismissing plaintiff's complaint on demurrer of the City of San Marcos for failure to state a cause of action. A timely petition for the discretionary review of the Supreme Court of the State of California was denied on April 17, 1991.

OPINIONS BELOW

The Fourth Appellate District Court of Appeal for the State of California, Division One, has issued an opinion in this case, a copy of which appears in **Appendix A** to this Petition. The opinion is not to be published in Official Reports. A copy of the Order of the California Supreme Court denying the Petition for Review in this case appears in **Appendix B** to this Petition.

The California Supreme Court denied a Petition for Review in the case of Yee v. City of Escondido, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990), an appellate opinion of the State Court of Appeals of California for the Fourth Appellate District, which is published, and has the same effect and holding as the unpublished opinion in Palomar.

The Superior Court of the State of California in and for the County of San Diego entered judgment dismissing plaintiff's complaint on demurrer on December 7, 1989 and a copy of the court's order appears in **Appendix C** to this petition.

JURISDICTION

The decision and judgment of the Fourth Appellate District, Division One, Court of Appeal for the State of California, was filed on February 6, 1991.

The Order of the California Supreme Court denying Appellant's Petition for Review was filed on April 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of. . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The California Constitution, Article I, Sec. 19, provides:

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The

Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

The San Marcos Municipal Code, Chapter 16.16 of Title 16, provides space rental rate controls for mobilehome parks located within its jurisdiction. Section 16.16.080 provides in pertinent part:

> All space rents in a park shall be adjusted at the same time. A mobilehome park owner shall not increase or adjust space rents more than one time in any twelve consecutive month period.

The California Mobilehome Residency Law (Cal. Civ. Code §§ 798 et seq.), specifically §§ 798.55, 798.56 & 798.74,

protect tenants from eviction from a mobilehome park and require the approval of a purchaser of a mobilehome that will remain in the park if the purchaser has the financial ability to pay the rent and does not have a prior tenancy history indicating he or she will not comply with the rules and regulations of the park. (Pertinent portions of Cal. Civ. Code §§ 798 et seq. are set forth in **Appendix D** to this Petition.)

STATEMENT OF CASE

This Petition seeks review of the California Fourth Appellate Court's opinion and judgment denying an unconstitutional and irrational taking of property results from vacancy control in mobilehome park rent control ordinances, in direct contravention of the established federal law in both the Ninth and Third Circuits under Hall v. City of Santa

Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990).

PROCEDURAL BACKGROUND AND HOW THE FEDERAL QUESTIONS AROSE

The Complaint

Plaintiff filed suit in the San Diego Superior Court on September 14, 1989, challenging the City of San Marcos' mobilehome rent control ordinance as applied to plaintiff on the basis that the inability of the plaintiff parkowner to raise rents on a space at the time a mobilehome is sold in-place effects a taking of property which is specifically condemned in Hall v. City of Santa Barbara, supra, by allowing the outgoing tenant to sell along with his or her trailer the right to occupy the rent-

controlled space, for which a quantifiable premium is received by the outgoing tenant representing the value of the right to occupy and for which the landlord parkowner receives nothing. (Comp. ¶¶ 11-14, 16-20, 21-29).

Plaintiff further complained that the ordinance "is irrational and serves no legitimate governmental purpose in that it enables the tenant in-place to sell the mobilehome for a "premium" due to the existence of rent control, and thus dramatically increases the mobilehome price resulting in forever burdening the space with the need to pay the additional premium, or to finance the additional premium, and, thus, the statute is both irrational and does not serve a legitimate governmental purpose of preserving low or affordable housing." (Comp. ¶ 15).

The Demurrer

The City demurred, arguing that Hall v. City of Santa Barbara, supra, was not binding on the state courts and that the proper standard for analyzing whether a taking had occurred or whether the ordinance was a rational exercise of the City's police powers was that used for facial attacks to rent control per se, i.e. if the parkowner was making a fair return on the park as a whole, the parkowner had no right to complain of the taking of a discrete property interest. (City's Memorandum of Points & Authorities in Support of Demurrer, filed Oct. 12, 1989, pp. 6-14).

Plaintiff opposed the demurrer, arguing that as in Hall v. City of Santa Barbara, supra, this was an as applied attack and Hall constituted the entire published case law on point to this

litigation and was, thus, controlling, and that the City's ordinance effected a taking in the same way as did the ordinance found unconstitutional in Hall. Plaintiff argued that by allowing the departing tenant to sell the right to occupy the rent-controlled space, a taking occurred under both the California Constitution and the fifth and fourteenth amendments to the U.S. Constitution. Plaintiff further argued that the ordinance was arbitrary and not rationally related to a legitimate state interest, citing Schweiker v. Wilson, 450 U.S. 221, Nebbia v. New York, 291 U.S. 502, and Seawall Associates v. City of New York, 142 A.2d 72, and referring to the determination of the Central District Court, on remand in Hall, that the Santa Barbara ordinance was irrational in that "the limitation upon rent raises at the

time of sale did nothing to (1) protect present tenants from arbitrary or excessive rent increases; and (2) insure the existence of moderate or low income housing opportunities." (Plaintiff's Points & Authorities in Opposition to Demurrer, filed Oct. 19, 1989, pp. 1-15).

The Ruling on Demurrer

The Superior Court ruled for defendants and entered judgment on December 7, 1989, without leave to amend, finding "that Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), is neither binding nor persuasive to establish a 'per se' taking, and Plaintiff is not and cannot allege deprivation of all use of property for a regulatory taking" and the Court on its own motion dismissed the "action as to all parties in its entirety with prejudice". (Superior Court Order dated Dec. 07, 1989, **Appendix C**).

The Appeal

Plaintiff timely appealed the dismissal to the Fourth Appellate District Court of Appeals for the State of California, Division One. In Appellant's Opening Brief, plaintiff PALOMAR MOBILEHOME PARK ASSOCIATION argued that the effect of the City of San Marcos' mobilehome park rent control ordinance with vacancy control was an unconstitutional taking under both the California Constitution and the fifth and fourteenth amendments to the U.S. Constitution and that this taking due to vacancy control was recognized and condemned as a physical occupation taking of property requiring compensation both in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and in the more recent case of Pinewood

Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990). Plaintiff argued that the federal cases constituted the controlling law as it was the only law on point to this litigation and the Central District had followed Hall, supra, in Azul Pacifico v. City of Los Angeles, (C.D.Cal. Case No. CV 87-2287-LEW) in rendering judgment for plaintiff and invalidating the Los Angeles mobilehome park rent ordinance because it did not provide for vacancy decontrol and thus effected an unconstitutional taking of property without compensation (that decision is now published as Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990)).

Appellant further argued that the ordinance violates the due process clause of the fourteenth amendment because it does not substantially advance legitimate

state interests, while effecting a physical taking of property, citing to Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987), in addition to those cases cited to the Superior Court, supra. (Appellant's Opening Brief, filed June 19, 1990).

The City argued that neither Hall v. City of Santa Barbara, supra, nor Pinewood Estates v. Barnegat Township, supra, were viable cases nor were they binding on the state courts, and that Azul Pacifico, supra, was merely a decision in which the Court was bound to follow Hall, supra.

Specifically, the City argued that the Hall case is against the weight of authority, rendered by a Ninth Circuit panel that was "confused" and "lost in their own rhetoric". (Respondent's Brief, filed on or about July 19, 1990, pp. 9-12). The City further argued that

subsequent cases decided by the U.S. Supreme Court undermined the Hall, supra, rationale. (Respondent's Brief, pp. 13-19).

As to the Pinewood, supra, case, the City argued that the Third Circuit's decision was flawed because it had not considered those cases which the City alleged undermined the Hall, supra, case, specifically F.C.C. v. Florida Power Corp., 480 U.S. 245, 107 S.Ct. 1107 (1987); Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849 (1988); Eamiello v. Liberty Mobile Home Sales, 208 Conn. 620, 546 A.2d 805 (1988) app. dism., __ U.S. __, 109 S.Ct. 1104 (1989); Thompson v. Merlino Enterprises, 208 Conn. 656, 545 A.2d 1094 (1988) app. dism. __ U.S. __, 109 S.Ct. 829 (1989) and United States v. Sperry, __ U.S. __, 110 S.Ct. 387 (1989) as well as Oceanside Mobilehome Park

Owners Assn. v. City of Oceanside, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (1984).

Appellant argued in Reply that, contrary to Respondent's assertions, there was no case law contrary to Hall, supra, Pinewood, supra, and Azul Pacifico, supra, as no other case addressed the issues in this litigation. Appellant explained the cases cited by the City were all distinguished from the present litigation in material ways which compelled the following of the federal cases which had specifically found vacancy control provisions of mobilehome park rent control ordinances effected a taking requiring compensation. (Appellant's Reply Brief, pp. 2-15).

Appellant further argued the standard to be applied in determining whether the ordinance satisfies substantive due process under the fourteenth amendment to

the U.S. Constitution is a higher standard of scrutiny due to the resultant physical taking of property under the ordinance. (Appellant's Reply Brief, pp. 15-16).

The Ruling on Appeal

The Fourth Appellate court issued its ruling on February 6, 1991, affirming the trial court's dismissal.

The Taking Claim

In summarizing the case, the Court said,

> Palomar's complaint alleged the "vacancy control" aspect (i.e. the restriction on the landlord's ability to raise rents at the time of vacancy) of the City of San Marcos's (City) mobilehome rent control ordinance was an unconstitutional taking by the government without compensation and an irrational exercise of governmental power which served no legitimate

purpose. We hold this facial attack as meritless, since there is no contention the vacancy control cannot be applied in a manner to ensure the park owner a fair return on his investment, and since the vacancy control serves the legitimate purpose of protecting new tenants from excessive rents. Palomar's allegation that the economic effect of the ordinance is to transfer the property's wealth from the landlord to the tenant--by allowing a departing tenant to sell his mobilehome at a price above "market value" while depriving the landlord of his right to extract that wealth from his property in the form of increased rents from the purchasing tenant--does not state a cognizable taking claim. Absent a showing the vacancy control aspect of

the ordinance makes it impossible for the landlord to obtain a fair and reasonable return on his investment, there is no facial invalidity to the City's exercise of regulatory power for the well-recognized purpose of preventing excessive rents which arise in an imperfect free market.

(4th App. Opn., pp 1-2, **Appendix A**).

In discussion, the Court asserted:

> For purposes of reviewing this appeal after the sustaining of a demurrer, we liberally construe and accept as true the allegations in the complaint. (King v. Central Bank (1977) 18 Cal.3d 840, 843.)

(4th App. Opn., **Appendix A**, pp. 5-6).

In characterizing plaintiff's complaint the court said:

> Palomar alleges an unconstitutional taking[1] has occurred since the rent control ordinance has the effect of allowing the tenant to sell his mobilehome for more than its market value based on the lower rent ensured to the purchasing tenant. Without the vacancy control, Palomar asserts, this "premium" extracted by the selling tenant would flow to the landlord, who could increase the rent to market levels at the time of the sale.

(4th App. Opn., **Appendix A**, p. 5).

Footnote 1 of the Court's Opinion reads:

> A governmental taking of private property without compensation is proscribed by the fifth amendment of

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the federal Constitution (see Pennell v. San Jose (1987) 485 U.S. 1, 4) and article I, section 19 of the California Constitution.

(4th App. Opn., **Appendix A**, p. 5).

Thus, in its determination that plaintiff had not stated a cognizable taking claim, the Fourth Appellate Court was adjudicating plaintiff's claims under the fifth (and fourteenth) amendments to the U.S. Constitution as well as under the California Constitution. However, in so ruling, the Court specifically declined to follow the federal cases of Hall, supra, and Pinewood, supra, saying in footnote 4:

> The decisions of lower federal courts may be persuasive, but they are not binding. (See Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 830.) The denial of a writ of certiorari in the Hall case carries no implication

regarding the United States Supreme court's views on the merits of the case. (See State of Maryland v. Baltimore Radio Show (1950) 70 S.Ct. 252, 255.)

(4th App. Opn., **Appendix A**, p. 11).

The Court noted elsewhere in its opinion in derogation of the federal cases of Hall and Pinewood Estates:

> Palomar's argument is divorced from the well-established principles used to evaluate when a compensable government taking has occurred in the context of rent control.. . .Absent a contention it is precluded from charging sufficient rent to obtain a reasonable return from its investment, Palomar's claim that the vacancy control allows the tenant to extract a "premium" from the sale of his

mobilehome is irrelevant to the taking issue presented here.. . .

Palomar's citation to Hall v. City of Santa Barbara [cite] and Pinewood Estates v. Barnegat Tp. Leveling Bd. [cite] does not persuade us otherwise.. . . Hall v. City of Santa Barbara, supra, 833 F.2d at page 1278, characterizes as irrelevant the argument that the landlord was adequately compensated by the rents he received, and in effect rejects the well-established test for a taking from rent control (i.e., whether the landlord can receive a fair return from his investment). Instead, relying on Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. 419, Hall v. City of Santa Barbara, supra, 833 F.2d at pages 1275-1276, applies the analysis used for a

permanent physical occupation of property. Hall v. City of Santa Barbara, supra, 833 F.3d at page 1278, concludes that case precedent upholding the validity of rent control ordinances was distinguishable, since those cases did not involve claims that the "tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." Pinewood Estates v. Barnegat Tp. Leveling Bd., supra, 898 F.2d at page 353, uses essentially the same analysis as Hall.

In our view, Hall's and Pinewood's reliance on Loretto is misplaced, and the cases erroneously

fail to apply the "fair return on investment" standard for rent control. (4th App. Opn., **Appendix A**, p. 11-14).

The Substantive Due Process Claim

In ruling on appellant's substantive due process claim, the Fourth Appellate Court used the standard applicable to facial attacks to price controls in general, rather than the standard proper for an as applied attack to a regulation that effects a physical occupation taking of property. In ruling against appellant, the Court said:

> Price control, including rent control, is unconstitutional under the due process clause of the Fourteenth Amendment of the federal Constitution if it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . . ." (Pennell v. San Jose,

supra, 484 U.S. at p. 11.) Palomar's allegations do not dispute that the vacancy control protects the purchasing tenant from excessive rent, which is a legitimate state interest, and which interest is not defeated by the alleged fact of an increase in the cost of the coach.

(4th App. Opn., **Appendix A**, p. 21-22).

The Federal Claim Did Not Even Exist At the Time the State Court Purported To Dispose of it

(a) Elements of a Cause of Action For Fifth Amendment Taking Claim.

The court in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985) set forth the elements of a taking claim under the fifth amendment as follows:

> The Fifth Amendment does not proscribe the taking of property; it

proscribes taking without just compensation.. . .If the government has provided an adequate process for taking compensation and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.. . .Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.. . .Thus, the state's action is not "complete" in the sense of causing the constitutional injury "unless or until the state fails to provide an adequate post deprivation remedy for the property loss".

Williamson Planning Comm., supra, 473 U.S. at 194-195, (internal citations omitted).

There are, thus, at least two elements to a taking claim under the fifth amendment: (1) a taking, and (2) a failure of post deprivation remedies to provide just compensation.

The second element for a taking under federal law is that the State by its conduct establish that adequate compensation will not be provided. That element can only be satisfied by utilizing state procedures, completing them without success, and then, and only then, is there a federal right under the Fifth Amendment. It is at that time of completion that plaintiff's federal claims arise.

Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), cert. den. __ U.S. __, 110

S.Ct. 1317 (1990) speaks to exactly the same point:

> So long as the state provides "an adequate process for obtaining compensation," no constitutional violation can occur until the state denies just compensation.

Sinaloa, supra, 882 F.2d at 1402, (emphasis added).

Since the state courts of California have failed to provide just compensation, the federal claim ripens only after state court action is complete and thus, the purported ruling on the federal claim is an act without any effect since the federal claim did not exist until and after the state court proceedings on the matter had come to an end.

(b) This is a Continuing Wrong, Each New Sale of a Coach Creates a New Cause of Action, and the Federal Claim is Now Ripe for Adjudication.

It is indisputable that a cause of action arises on each sale of a coach. Since a cause of action under Hall does not exist until there has been the monetization of the right to occupy the space at a reduced rent by the departing tenant (i.e., the tenant receives a premium due to rent control), unless and until the premium has been received, no cause of action may be maintained.

Two examples illustrate the point:

(a) Suppose an ordinance is passed, and, thereafter, for a period of five years a coach is not sold. No cause of action exists under Hall, there has been no prohibited transfer of the premium value of the coach, and the cause of

action will arise, if at all, at the time of the sale of the coach.

(b) Suppose after a statute is passed, real property values decline for a period of five years, and the departing tenant receives no premium value for the coach upon sale. Again, under Hall, there would be no cause of action upon which a lawsuit can be maintained.

The application of defendant's ordinance to plaintiff's private property effects a taking without just compensation. It is a continuing wrong. The question of when a claim accrues is determined by federal law. McCune v. City of Grand Rapids, 842 F.2d 903, 905 (6th Cir. 1988); Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984); Storey v. U.S., 629 F.Supp. 1174, 1177 (ND Miss. 1986).

The continuing wrong applies in federal court:

> Where a continuous chain of events or course of conduct is involved the cause of action accrues at the time of the final act in a series of event or course of conduct.

Barbaccia v. County of Santa Clara, 451 F.Supp. 260, 266 (ND Cal. 1978).

The continuing wrong doctrine also applies to civil rights violations and taking claims which are made in federal court. Front Royal and Warren Industrial Parks v. Front Royal, 708 F.Supp. 1477 (WD Va. 1989). The Front Royal court rules that a city's refusal to connect sewers to a property was a continuing wrong and that the statute of limitations did not begin running on the date that sewers were scheduled to be installed.

> This court has previously considered the statute of limitations defense offered by defendants and has found

> that, since there was a continuing wrong, plaintiff's action [for inverse condemnation and civil rights violation] are not time barred.

(708 F.Supp. at 1487).

Similarly in Lockary v. Kayfetz, 587 F.Supp. 631, 635 (N.D. Cal. 1984), the district court applied the continuing wrong doctrine to a taking claim on the grounds that the implementation and enforcement of a water moratorium was a continuing wrong.[2]

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[2] The California Supreme Court applied a continuing wrong doctrine to an action brought by neighboring homeowners for inverse condemnation and nuisance against a public entity operating an airport in Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 705 P.2d 866 (1985). The Baker court discussed the difference between permanent and continuing nuisances:

> On the one hand, permanent nuisances are of a type where 'by one act a permanent injury is done, [and] damages are assessed once for all.' . . . Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes

The source of an entire claim needs to be analyzed to determine if a wrong is continuing:

> We are not now called upon to decide whether in a situation like this (recovery of inverse condemnation damages after the government flooded land) a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an

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into existence.

On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. 39 Cal.3d 862 at 868-869.

The Baker court went on to discuss the importance of plaintiff's election to treat the nuisance as permanent or continuing:

> In case of doubt as to the permanency of the injury the plaintiff may elect whether to treat a particular nuisance as permanent or continuing. The importance of the plaintiff's election has long been recognized. 39 Cal.3d at 870.

> action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him - for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim . . . is not a single event; it is continuous and as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.

United States v. Dickinson, 331 U.S. 745, 749 (1946).

A variation on the continuing wrong doctrine is found in Gordon v. City of Warren, 579 F.2d 386 (7th Cir. 1978). In Gordon the court ruled that the statute of limitations for damages under 42 U.S.C. § 1983 did not even begin to run until the ordinance at issue was declared invalid. The district court had applied a three-year statute of limitations running from the date of enactment and rejected application of the continuing wrong doctrine. The Court of Appeal reversed setting the date of the accrual of the right to seek damages as the date on which the court ruled the ordinance invalid.

Here, the request to declare the ordinance invalid is made in the same action as the damage claim. Application of a rule of accrual which would run from the date of declaration of invalidity is a variant on the continuing wrong doctrine.

The plaintiff meets either characterization of the rule. The right of action claimed by the plaintiff to recover damages accrued within the time permitted in the statute of limitations.

Another manner in which to determine if a wrong is a continuing wrong is to look at how a remedy can be fashioned. If the plaintiff could sue for all damages and recover them in one action, the wrong would not be continuing. (See Korgel v. U.S., 619 F.2d 16 (8th Cir. 1980)).

It has been held that the enactment of an ordinance alone does not give rise to a cause of action. It is the resulting damage under the ordinance that gives rise to a claim. (Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 293-297 (1981); Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d (1988)).

Recovery is only available to plaintiff as to coaches which have sold. Mobilehome coaches which have not sold have not resulted in a transfer of the unconstitutionally taken rights as the party owning the coach has only benefitted from the constitutional portions of the City's rent control scheme.

It is only when the mobilehome coach owner sells that the authority of the unconstitutional portions of the rent control scheme are invoked. It is only when the mobilehome coach sells that damage arises. It is an essential corollary that a separate damage arises each time a coach is sold. Since the plaintiff cannot recover in one action for the damages from coaches that have not yet sold, plaintiff would require successive actions for damages. The need for

successive actions is a hallmark of a continuing wrong.

> Where the damages resulting from an act are continuing or recurring so that they cannot at present be ascertained or estimated to bring in a single action, then separate and successive actions may be brought to recover damages as they occur. In those cases, the action accrues for purposes of the limitation period from the date of each injury and the plaintiff is not barred for a recovery for such damages as have accrued within this statutory period before the filing of the action.

Piccolini v. Simon's Wrecking, 686 F.Supp. 1063, 1076-1077 (MD Pa. 1988).

The Petition for Review to the California Supreme Court

A Petition for (the discretionary) Review to the California Supreme Court was timely filed by plaintiff/ appellant/ petitioner PALOMAR MOBILEHOME PARK ASSOCIATION. In its Petition, PALOMAR argued that the California Supreme Court should take the case for review as the decision rendered in the Fourth Appellate District, Division One, was directly in contravention to federal case law established by the Hall, Pinewood Estates, and Azul Pacifico cases (cited supra). However, the California Supreme Court entered an order denying the Petition on April 17, 1991.

WHY THIS WRIT SHOULD BE GRANTED

Special and important reasons exist for the granting of this Petition for Review as identified in Supreme Court Rule

10. The important questions of federal law presented here have never been ruled upon by this Court.

As specifically enunciated in Supreme Court Rule 10 (b), review may be granted:

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of a U.S. court of appeals.

In Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), the Ninth Circuit Court found the Santa Barbara mobilehome rent control ordinance, identical in legal effect to the ordinance in San Marcos, effected an unconstitutional taking without compensation.

In Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990), the Third Circuit found that

vacancy control provisions of the Barnegat mobilehome park rent control ordinance in conjunction with state law (similar to the California Mobilehome Residency laws) effected a physical occupation taking without compensation in violation of the fifth and fourteenth amendments to the U.S. Constitution.

The state courts here specifically denied the viability of the Hall, supra, and Pinewood, supra, cases, and, concluding that they were not bound to follow them, determined that plaintiffs could not state a cause of action under either the California Constitution or the federal Constitution.

Petitioner contends the California state courts erred in determining federal rights under the fifth and fourteenth amendments in contravention of the entire published federal case law on point. In

essence, by refusing to accept the precedents established in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990), and further explained in Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990), while determining that plaintiff petitioner had failed to state a cognizable taking claim, the California Fourth Appellate court, Division One, has effectively overruled the decisions of two unanimous federal appeals courts.

Such flagrant disregard for federal law cannot be tolerated. This Supreme Court should grant this Petition for Review to protect this and similar plaintiffs from having their constitutional rights extinguished by

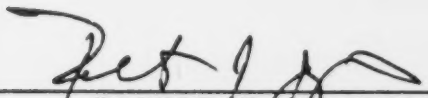
state courts who fail to follow federal court precedence on issues of federal law.

IN CONCLUSION

Petitioner PALOMAR MOBILEHOME PARK ASSOCIATION requests this court to grant its petition for review or in the alternative to remand to the lower court with instructions to limit its decision to state constitutional issues and in accord with ruling federal constitutional law.

Respectfully submitted,

LAW OFFICES OF JAGIELLO & PECH

By 
ROBERT J. JAGIELLO
Attorneys for Petitioner
PALOMAR MOBILEHOME PARK ASSOCIATION

APPENDIX A

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PALOMAR MOBILEHOME PARK ASSOCIATION,	)	
Plaintiff and Appellant,	)	D011484
v.	)	(Super. Ct. No. N45074)
CITY OF SAN MARCOS,	)	
Defendants and Respondents.	)	

Filed February 6, 1991.

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. O'Neill, Judge. Affirmed.

Palomar Mobilehome Park Association (Palomar) appeals a judgment of dismissal after the sustaining of a demurrer. Palomar's complaint alleged the "vacancy control" aspect (i.e. the restriction on

the landlord's ability to raise rents at the time of vacancy) of the City of San Marcos's (City) mobilehome rent control ordinance was an unconstitutional taking by the government without compensation and an irrational exercise of governmental power which served no legitimate purpose. We hold this facial attack as meritless, since there is no contention the vacancy control cannot be applied in a manner to ensure the park owner a fair return on his investment, and since the vacancy control serves the legitimate purpose of protecting new tenants from excessive rents. Palomar's allegation that the economic effect of the ordinance is to transfer the property's wealth from the landlord to the tenant -- by allowing a departing tenant to sell his mobilehome at a price above "market value" while depriving the landlord of his right to

extract that wealth from his property in the form of increased rents from the purchasing tenant -- does not state a cognizable taking claim. Absent a showing the vacancy control aspect of the ordinance makes it impossible for the landlord to obtain a fair and reasonable return on his investment, there is no facial invalidity to the City's exercise of regulatory power for the well-recognized purpose of preventing excessive rents which arise in an imperfect free market.

I

The City's mobilehome rent control ordinance establishes a Mobile Home Rent Review commission which reviews proposed rent increases for mobilehome spaces. (San Marcos Mun. Code, § 16.16.) The ordinance includes findings that a shortage of mobilehome rental spaces and

the cost of moving a mobilehome has created an imbalance in the bargaining position of park owners and mobilehome owners in favor of park owners, and declares it necessary to protect the mobilehome owner from unreasonable space rental increases while at the same time recognizing the need of park owners to receive a just and reasonable return on their investments. (San Marcos Mun. Code, § 16.16.010.) The ordinance requires all space rents be adjusted at the same time and no more than one time in any 12 month period, with written notice of the increase to the City and the mobilehome owners. (San Marcos Mun. Code, §§ 16.16.080, subd. (a) & 16.16.055.) If a complying homeowner rent review petition is filed, the increase is stayed until the Mobile Home Rent Review commission makes its decision. (San Marcos Mun. Code, §

16.16.060.) At a public hearing, the park owner has the burden of proving the increase is reasonable and necessary to enable him to receive a just and reasonable return on his investment. (San Marcos Mun. Code, § 16.16.070, subd. (g).)

Palomar alleges an unconstitutional taking[1] has occurred since the rent control ordinance has the effect of allowing the tenant to sell his mobilehome for more than its market value based on the lower rent ensured to the purchasing tenant. Without the vacancy control, Palomar asserts, this "premium" extracted by the selling tenant would flow to the landlord, who could increase the rent to

[1] A governmental taking of private property without compensation is proscribed by the Fifth Amendment of the federal Constitution (see Pennell v. San Jose (1987) 485 U.S. 1, 4) and article I, section 19 of the California Constitution.

market levels at the time of the sale. For purposes of reviewing this appeal after the sustaining of a demurrer, we liberally construe and accept as true the allegations in the complaint. (King v. Central Bank (1977) 18 Cal.3d 840, 843.)

We note preliminarily that at some points in its argument, Palomar refers to the combined effect of the rent control ordinance and the California Mobilehome Residency Law -- the former which restricts the park owner's ability to raise rents, and the latter which precludes termination of a tenancy except for specified reasons constituting good cause and requires a park owner to accept the new tenant purchasing a coach from a departing tenant except under certain specified circumstances (Civ. Code, §§

798.56, 798.74).[2] However, Palomar states it is not challenging the constitutionality of the state law, asserting that even absent the state law, the local rent control ordinance would achieve a taking. Palomar explains no taking would occur if it could raise the rent to market rates for the new purchasing tenant. Thus, the crux of its complaint is the rent controls not the requirement it accept the new tenant. More specifically, Palomar complains about the vacancy control aspect of the

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[2] The state statute states findings that "because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter." (Civ. Code, § 798.55, subd. (a).)

ordinance -- i.e., the fact the ordinance does not lift the rent increase restrictions when a new tenant moves in.

Essentially, the same arguments raised in this appeal have recently been rejected by this court in Yee v. City of Escondido (1990) 224 Cal.App.3d 1349, and by another court in Peppard v. City of Carpinteria (filed Jan. 3, 1991, B047242) 91 Daily J. D.A.R. 245.

Palomar's argument is divorced from the well-established principles used to evaluate when a compensable government taking has occurred in the context of rent control. Rent control ordinances "are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property. However, if it is apparent from the face

of the provisions that their effect will necessarily be to lower rents more than could reasonably be considered to be required for the measure's stated purpose, they are unconstitutionally confiscatory." (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 165; see generally, Carson Mobilehome Park Owners' Assn. v. City of Carson (1983) 35 Cal.3d 184, 191; Pennell v. San Jose, supra, 485 U.S. at p. 12, fn. 6; FCC v. Florida Power Corp. (1987) 480 U.S. 245, 252; Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 440.) A rent control ordinance will be struck down as facially confiscatory only if its terms are so restrictive so as to facially preclude any possibility of a just and fair return. (Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside (1984) 157 Cal.App.3d 887, 897, 906-907.)

As in Yee, Palomar does not argue that the vacancy control aspect of the ordinance is not reasonably calculated to eliminate excessive rents, or that it will necessarily result in confiscatorily low rents (see Carson Mobilehome Park Owners' Assn. v. City of Carson, supra, 35 Cal.3d at p. 189, fn. 4; San Marcos Mobilehome Park Owners' Assn. v. City of San Marcos (1987) 192 Cal.App.3d 1492, 1502-1503); nor does it argue the ordinance as applied has forced confiscatorily low rents on the landlord. Accordingly, it has not presented a cognizable taking claim. Absent a contention it is precluded from charging sufficient rent to obtain a reasonable return from its investment, Palomar's claim that the vacancy control allows the tenant to extract a "premium" from the sale of his mobilehome is irrelevant to the taking issue presented

here.[3] (See Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, supra, 157 Cal.App.3d at pp. 906-907.)

Palomar's citation to Hall v. City of Santa Barbara (9th Cir. 1986) 833 F.2d 1270, cert. den. 485 U.S. 940 and Pinewood Estates v. Barnegat Tp. LevelingBd. (3rd

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[3] Under rent control theory, imperfect free market conditions (i.e. scarcity of and high demand for rental property) can result in artificially inflated rents, which justifies rent controls to protect tenants from burdensome rent increases. (See Pennell v. San Jose, supra, 485 U.S. at pp. 11-13.) Palomar may debate with the legislative branch the economic wisdom of rent control and vacancy control provisions. However, Palomar's argument -- premised on a claim that economic wealth from property has been transferred from landlord to tenant -- lacks a valid legal underpinning when tested against the well-established test for a taking from rent control. Palomar may argue to the courts that the ordinance has been unconstitutionally applied by denying it a fair rent increase. HOwever, absent a showing the rent controls can never give it a fair return, Palomar's facial attack on the ordinance as constituting a taking is meritless.

Cir. 1990) 898 F.2d 347 does not persuade us otherwise.[4] Hall v. City of Santa Barbara, supra, 833 F.2d at page 1276, reverses a dismissal of a complaint, holding there was a factual question whether a mobilehome rent control ordinance transferred a possessory interest in land from the landlord to the tenant, which interest consisted of the tenant's right to occupy the property in perpetuity while paying a reduced rent, and which interest the tenant could sell in the open market by capturing a rent control premium when he sells his mobile home. Hall v. City of Santa Barbara,

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[4] The decisions of lower federal courts may be persuasive, but they are not binding. (See Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 830.) The denial of a writ of certiorari in the Hall case carries no implication regarding the United States Supreme court's views on the merits of the case. (See State of Maryland v. Baltimore Radio Show (1950) 70 S.Ct. 252, 255.)

supra, 833 F.2d at page 1278, characterizes as irrelevant the argument that the landlord was adequately compensated by the rents he received, and in effect rejects the well-established test for a taking from rent control (i.e., whether the landlord can receive a fair return from his investment). Instead, relying on Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. 419, Hall v. City of Santa Barbara, supra, 833 F.2d at pages 1275-1276, applies the analysis used for a permanent physical occupation of property. Hall v. City of Santa Barbara, supra, 833 F.3d at page 1278, concludes that case precedent upholding the validity of rent control ordinances was distinguishable, since those cases did not involve claims that the "tenant's right to possess the property at reduced rental rates was

transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." Pinewood Estates v. Barnegat Tp. Leveling Bd., supra, 898 F.2d at page 353, uses essentially the same analysis as Hall.

In our view, Hall's and Pinewood's reliance on Loretto is misplaced, and the cases erroneously fail to apply the "fair return on investment" standard for rent control. Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. 419 at pages 434-435, 440-441, narrowly holds that where governmental action is a permanent physical occupation of property (i.e., a law requiring landlords to permit cable television attachments to their buildings), a per se taking has occurred regardless of whether the action achieves

an important public benefit or has only minimal economic impact on the owner. Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at page 426, commences its analysis by noting that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises form some public program adjusting the benefits and burdens of economic life to promote the common good." Loretto expressly states its holding is not meant to interfere with the government's power to adjust landlord/tenant relationships, pointing to the court's consistent affirmance of the states' power to regulate the landlord/tenant relationship without paying compensation for all economic injuries that such regulation entails (id. at p. 440, citing Supreme

court cases upholding rent control laws), and noting that in "none of these cases . . . did the government authorize the permanent occupation of the landlord's property by a third party" (ibid.).

As we noted earlier, Palomar is not challenging the state law requirement that it accept the new purchasing tenant chosen by the selling tenant -- thus this component of the regulatory scheme does not bring this case into the "permanent physical occupation" parameters of Loretto.[5] As explained by Palomar, even

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[5] We note that in Eamiello v. Liberty Mobile Home Sales (Conn. 1988) 546 A.2d 805, 816-817, the court held a state law's requirement that a mobilehome park owner allow a tenant to extend the term of his lease indefinitely and to transfer that right to a purchaser of his mobilehome, did not constitute permanent physical occupation under Loretto. Accordingly, since no per se taking had occurred, Eamiello v. Liberty Mobile Homes Sales, supra, 546 A.2d at pages 819-820, evaluates whether a taking had occurred based on whether the ordinance served a substantial public purpose without undue

if the landlord had exclusive power to chose the new tenant, under the local ordinance it still would be subject to the rent increase restrictions. Thus, it is not the physical occupation of the new tenant which is being challenged, but rather the challenge is to the limits on the rent increases and corresponding effect on the price of the selling tenant's coach. And, contrary to the analysis used in Hall, this is not a case which challenges the transfer of a

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harm to the economic interests of mobilehome park owners, and concludes there was no taking. Eamiello notes that unlike the ordinance in Hall, the ordinance before it did not provide for rent control, but merely restricted rent increases to levels consistent with rents for comparable lots in the park. (Eamiello v. Liberty Mobile Home Sales, supra, 546 A.2d at p. 820.) The ordinance we are presented with does of course provide for rent control, but, as we have stated, there is no contention the limits on the rent increases have caused an economic hardship to the park owner.

possessory interest from landlord to tenant, since even if the landlord retained the right to choose the purchasing tenant, Palomar would still be complaining about the restriction on rent increases at vacancy and the corresponding increase in the value of the mobilehome sold by the departing tenant.

The alleged effect of the vacancy control aspect of the ordinance, as allowing tenants to sell their mobilehomes at a higher price than tenants at noncontrolled parks, cannot reasonably be construed as a "permanent physical occupation" within the meaning of Loretto. A Supreme Court case subsequent to Hall has again emphasized there is no per se taking under Loretto when the government action does not force a property owner to acquiesce to a physical occupation of his property. (FCC v. Florida Power Corp.,

supra, 480 U.S. at pp. 252-253 [no per se taking arising from FCC review of rents charged by public utility landlords who rent utility pole space to cable company tenants].) Here, the complained-of effect of the vacancy control is upon the landlord's return from the free market -- which is an adjustment "of the benefits and burdens" of economic life, not a physical occupation. Accordingly, the vacancy control is not a per se taking, and it can only be challenged upon a claim it deprives the landlord of a fair return on his investment, a contention not presented here. The alleged fact the tenant may obtain a higher price for the sale of his mobilehome than a tenant in a noncontrolled park,[6] does not indicate the

[6] We note that assuming the truth of Palomar's alleged facts that rent controlled tenants obtain more for their mobilehomes than non-rent controlled tenants, Palomar's contention can easily

landlord is necessarily being deprived of a fair return from the face of the ordinance.[7]

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be turned on its head to characterize the vacancy control as not providing the tenants a "premium" from the sale of their home, but rather as protecting tenants from the landlord's ability to reap a monetary windfall by charging excessively high rents available in the imperfect free market and thereby artificially deflating the price of the tenant's mobilehome. (See fn. 3, ante.) In any event, since Palomar does not assert it cannot raise rents to a level to give it a fair return on its investment, its concern about the cost of mobilehomes in sales transactions between tenants is irrelevant to the constitutional challenge presented here.

[7] In Hall v. City of Santa Barbara, supra, 833 F.2d at pages 1282-1283, three judges dissented from the majority's denial of a petition for a rehearing en banc, pointing out that the United States Supreme court in recent years has dismissed, as lacking a substantial federal question, challenges to comparable rent control ordinances, and concluding that the "reason that the Supreme court has had little difficulty with rent control cases is that economic regulation of landowners' profit does not constitute a taking so long as the owner is allowed a reasonable return on investment."

In Azul Pacifico, Inc. v. City of Los Angeles (C.D.Cal. 1990) 740 F.Supp. 772, 774, 779, the lower district court was

II

Palomar asserts the vacancy control aspect of the ordinance violates substantive due process since it does not advance legitimate state interests because (1) the limitation on increases in rent at the time of sale does nothing to protect the present tenant, and (2) by causing dramatic increases in the prices of coaches, it does nothing to preserve low and moderate income housing opportunities. Price control, including rent control, is unconstitutional under the due process

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bound to follow Hall's analysis, and the court held the vacancy control provision of a mobilehome rent control ordinance constituted a taking based on the amount the selling tenant obtained for his mobilehome above the price of a comparable home in a noncontrolled park. We note Azul-Pacifico contains strong dicta suggesting it disagrees with Hall's physical taking analysis, and only reached its result because it was bound to do so under Hall. (Azul-Pacifico, Inc. v. City of Los Angeles, supra, 740 F.Supp. at pp. 774, 778, 780-781.)

clause of the Fourteenth Amendment of the federal Constitution if it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . . ." (Pennell v. San Jose, supra, 484 U.S. at p. 11.) Palomar's allegations do not dispute that the vacancy control protects the purchasing tenant from excessive rent, which is a legitimate state interest, and which interest is not defeated by the alleged fact of an increase in the cost of the coach. Since there is no contention the vacancy control does not reasonably relate to the legitimate interest of preventing excessive rents, any challenge to the wisdom of the measure based on the cost of the coaches is a policy question for the Legislature, not the courts. (Birkenfeld v. City of Berkeley, supra, 17 Cal.3d at p. 159.)

The complaint fails to state facts entitling Palomar to relief, and the demurrer was properly sustained.

DISPOSITION

The judgment is affirmed.

/S/ Work
Work, Acting
P.J.

WE CONCUR:

/S/ Todd, J.
Todd, J.

/S/ Benke, J.
Benke, J.

APPENDIX B

APPENDIX B

Fourth Appellate District, Division One
No. D011484, SO19940

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PALOMAR MOBILEHOME PARK ASSOCIATION, Appellant

v.

CITY OF SAN MARCOS Et Al., Respondents

Filed April 17, 1991

Appellant's petition for review DENIED. The request for an order directing publication of the opinion is denied.

Panelli, J. is of the opinion the petition should be granted.

Baxter, J. did not participate.

/S/ LUCAS
Chief Justice

APPENDIX C

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

PALOMAR MOBILEHOME PARK ASSOCIATION, a Limited Partnership, Plaintiff, v. THE CITY OF SAN MARCOS, a Municipal Corporation, and DOES 1 through 10, inclusive, Defendants.	CASE NO. N54074 ORDER GRANTING CITY OF SAN MARCOS' DEMURRER AND DISMISSING ENTIRE ACTION AS TO ALL PARTIES DATE: 11-6-89 TIME: 2:00 p.m. DEPT: D

Filed December 7, 1989.

On November 6, 1989, the Honorable Robert O'Neill, Judge of the San Diego Superior Court, issued a telephonic ruling on Defendant City of San Marcos' Motion to Strike Portions of Plaintiff's Complaint and Demurrer. The Court, having read and considered the supporting and opposing points and authorities, and Plaintiff

having waived its right to present oral argument by not scheduling a hearing within five days of the telephonic ruling under San Diego Court Rule 2.2, and good cause appearing,

IT IS ORDERED that:

(1) Judicial Notice is taken as requested as to the Memorandum of Decision and February 10, 1989 Order only;

(2) Defendant's General Demurrer to the First and Second Causes of Action is sustained without leave to amend as Court finds that Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), is neither binding nor persuasive to establish a "per se" taking, and Plaintiff is not and cannot allege deprivation of all use of property for a regulatory taking;

(3) The Court on its own motion dismisses this action as to all parties in its entirety with prejudice; and

(4) Under the circumstances defendant's Special Demurrer and Motion to Strike Portions of Plaintiff's Complaint is moot.

DATED: Dec 7, 1989

/S/ Robert J. O'Neill
Judge of the Superior Court

APPROVED AS TO FORM:

/S/ Robert J. Jagiello
Robert J. Jagiello
Attorney for Plaintiff
PALOMAR MOBILEHOME PARK ASSOCIATION

APPENDIX D

APPENDIX D

CALIFORNIA MOBILEHOME RESIDENCY LAWS

(EXCERPTS)

ARTICLE 6. TERMINATION OF TENANCY

§ 798.55. Protection from actual or constructive eviction; termination or refusal to renew; reasons; notice; time

(a) The Legislature finds and declares, that because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afford by the provisions of this chapter.

(b) The management shall not terminate or refuse to renew a tenancy,

except for a reason specified in this article and upon the giving of written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, as defined in Section 18005.8 of the Health and Safety Code, each junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, and the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner addressed to the legal owner and junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in Section 18091.5 of the Health and Safety Code.

§ 798.56. Authorized reasons for termination

A tenancy shall be terminated by the management only for one or more of the following reasons:

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency.

(b) Conduct by the homeowner or resident, upon the park premises, which constitutes a substantial annoyance to other homeowners or residents.

(c) Conviction of the homeowner or resident for prostitution or a felony controlled substance offense if the act resulting in the conviction was committed anywhere on the premises of the mobilehome

park, including, but not limited to, within the homeowner's mobilehome.

However, the tenancy may not be terminated for the reason specified in this subdivision if the person convicted of the offense has permanently vacated, and does not subsequently reoccupy, the mobilehome.

(d) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park which is part of the rental agreement or any amendment thereto.

No act or omission of the homeowner or resident shall constitute a failure to comply with a reasonable rule or regulation unless and until the management has given the homeowner written notice of the alleged rule or regulation violation and the homeowner or resident has failed to adhere to the rule or regulation within

seven days. However, if a homeowner has been given a written notice of an alleged violation of the same rule or regulation, on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no written notice shall be required for a subsequent violation of the same rule or regulation.

Nothing in this subdivision shall relieve the management from its obligation to demonstrate that a rule or regulation has in fact been violated.

(e)(1) Nonpayment of rent, utility charges, or reasonable incidental service charges; provided that the amount due has been unpaid for a period of at least five days from its due date, and provided, that the homeowner shall be given a three-day written notice subsequent to that five-day period to pay the amount due or to vacate

the tenancy. For purposes of this subdivision, the five-day period does not include the date the payment is due. The three-day written notice shall be given to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure. A copy of this notice shall be sent to the persons or entities specified in subdivision (b) of Section 798.55 within 10 days after notice is delivered to the homeowner. If the homeowner cures the default, the notice need not be sent. The notice may be given at the same time as the 60 days' notice required for termination of the tenancy.

(2) Payment by the homeowner prior to the expiration of the three-day notice period shall cure a default under this subdivision. In the event the homeowner does not pay prior to the expiration of the three-day notice period, the homeowner

shall remain liable for all payments due up until the time the tenancy is vacated.

(3) Payment by the legal owner, as defined in Section 18005.8 of the Health and Safety Code, any junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, or the registered owner, as defined in Section 18009.5 of the Health and Safety Code, if other than the homeowner, on behalf of the homeowner prior to the expiration of 30 calendar days following the mailing of the notice to the legal owner, each junior lienholder, and the registered owner provided in subdivision (b) of Section 798.55, shall cure a default under this subdivision with respect to that payment.

(4) Cure of a default of rent, utility charges, or reasonable incidental service charges by the legal owner, any junior lienholder, or the registered

owner, if other than the homeowner, as provided by this subdivision, may not be exercised more than twice during a 12-month period.

(5) If a homeowner has been given a three-day notice to pay the amount due or to vacate the tenancy on three or more occasions within the preceding 12-month period, no written three-day notice shall be required in the case of a subsequent nonpayment of rent, utility charges, or reasonable incidental service charges.

In that event the management shall give written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, each junior lienholder, and the

registered owner of the mobilehome, if other than the homeowner, as specified in paragraph (b) of Section 798.55, by certified or registered mail return receipt requested within 10 days after notice is sent to the homeowner.

(f) Condemnation of the park.

(g) Change of use of the park or any portion thereof, provided:

(1) The management gives the homeowners at least 15 days' written notice that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use of the mobilehome park.

(2) After all required permits requesting a change of use have been approved by the local governmental board, commission, or body, the management shall

give the homeowners six months' or more written notice of termination of tenancy.

If the change of use requires no local governmental permits, then notice shall be given 12 months or more prior to the management's determination that a change of use will occur. The management in the notice shall disclose and describe in detail the nature of the change of use.

(3) The management gives each proposed homeowner written notice thereof prior to the inception of his or her tenancy that the management is requesting a change of use before local governmental bodies or that a change of use requested has been granted.

(4) The notice requirements for termination of tenancy set forth in Section 798.56 and 798.57 shall be followed if the proposed change actually occurs.

(5) A notice of a proposed change of use given prior to January 1, 1980, which conforms to the requirements in effect at that time shall be valid. The requirements for a notice of a proposed change of use imposed by this subdivision shall be governed by the law in effect at the time the notice was given.

(h) The report required pursuant to subdivisions (b) and (i) of Section 65863.7 of the Government code shall be given to the homeowners or residents at the same time that notice is required pursuant to subdivision (g) of this notice.

§ 798.56a. Notice to management after receipt of notice of termination by legal owner and each junior lienholder; right to sell mobilehome within park

(a) Within 60 days following receipt, or not later than 65 days after the

mailing, of the notice of termination of tenancy for nonpayment, or rent or other charges, the legal owner and each junior lienholder shall notify the management in writing of at least one of the following:

(1) Its offer to sell the obligation secured by the mobilehome to the management for the amount specified in its written offer. In that event, the management shall have 15 days following receipt of the offer to accept or reject the offer in writing. If the offer is rejected, the person or entity shall have 10 days in which to exercise one of the other options contained in this section and shall notify management in writing of its choice.

(2) Its intention to foreclose on its security interest in the mobilehome.

(3) Its request that the management pursue the termination of tenancy against

the homeowner and its offer to reimburse management for the reasonable attorney's fees and court costs incurred by the management in that action.

(b) In the event that the legal owner or junior lienholder exercises any option described in paragraph (2) or (3) of subdivision (a), and has the right to sell the mobilehome within the park to a third party in accordance with this article, that person or entity shall have the right to keep the mobilehome on the site within the mobilehome park until it is resold as long as the person or entity performs all of the following acts:

(a)(A) Satisfies, within the time period specified in subdivision (a), all of the homeowner's responsibilities and liabilities owing to the management for the 90 days preceding the mailing of the notice of termination of tenancy and then

continue to satisfy them as they accrue from the date of the mailing of that notice until the date the mobilehome is resold.

(B) Performance under this paragraph does not cure the default of the homeowner.

(C) For purposes of this paragraph, the "homeowner's responsibilities and liabilities" means all rents, utilities, reasonable maintenance charges of the mobilehome and its premises, and reasonable maintenance of the mobilehome and its premises pursuant to existing park rules and regulations.

(2) Within the time period specified in subdivision (a), commences all repairs and necessary corrective actions so that the mobilehome complies with park rules and regulations in existence at the time the notice of termination of tenancy was

given as well as the health and safety standards specified in Sections 18550, 18552, and 18605 of the Health and Safety Code, and completes these repairs and corrective actions within 90 calendar days of that notice, or before the date the mobilehome is resold, whichever is earlier.

(3) Complies with the requirements of Article 7 (commencing with Section 798.70) as it relates to the transfer of a mobilehome to a third party.

(c) In the event the legal owner or junior lienholder does not respond to the notice provided by management by notifying management in writing of its election pursuant to subdivision (a), or does not satisfy the requirements of subdivision (b), that person or entity shall have no rights to sell the mobilehome within the park to a third party.

(d) In the event the homeowner files for bankruptcy, the periods set forth in this section are tolled until the mobilehome is released from bankruptcy.

(e) Notwithstanding any other provision of law, including, but not limited to, Section 18099.5 of the Health and Safety Code, in the event neither the legal owner nor a junior lienholder, if any, notifies the management of its decision pursuant to subdivision (a) within the period allowed, or performs as agreed within 30 days, the management may either remove the mobilehome from the premises and place it in storage or store it on its site. In this case, notwithstanding any other provision of law, the management shall have a warehouseman's lien in accordance with Section 7209 of the Commercial Code against the mobilehome for the costs of

dismantling and moving, if appropriate, as well as storage, which shall be superior to all other liens, except the lien provided for in Section 18116.1 of the Health and Safety Code, and may enforce the lien pursuant to Section 7210 of the commercial code.

(f) All written notices required by this section shall be sent to the other party by certified or registered mail with return receipt requested.

ARTICLE 7. TRANSFER OF MOBILEHOME OR MOBILEHOME PARK

§ 798.74. Prior approval of purchaser; grounds for withholding; financial information; notice of acceptance or rejection; interview; fee; credit or refund

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park

and that the selling homeowner or his or her agent gives notice of the sale to the management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. In determining whether the purchaser has the financial ability to pay the rent and charges of the park, the management shall not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support.

Upon request of any prospective homeowner who proposes to purchase a mobilehome that will remain in the park, management shall inform that person of the information management will require in order to determine if the person will be acceptable as a homeowner in the park.

Within 15 business days of receiving all of the information requested from the prospective homeowner, the management shall notify the seller and the prospective homeowner, in writing, of either acceptance or rejection of the application, and the reason if rejected. During this 15-day period the prospective homeowner shall comply with the management's request, if any, for a personal interview. If the approval of a prospective homeowner is withheld for any reason other than those stated in this article, the management or owner may be

held liable for all damages proximately resulting therefrom.

(b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee, or a portion thereof, to defray its administrative costs under this section.

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

No. 90-1824

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

PALOMAR MOBILEHOME PARK ASSOCIATION,
A Limited Partnership,
Petitioner,

vs.

THE CITY OF SAN MARCOS,
Respondent.

On Petition for a Writ of Certiorari To The Fourth Appellate District, Division One, Court of Appeal For The State of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the state court was correct in ruling that the City of San Marcos' Mobilehome Rent Review Ordinance did not constitute a federal taking even though it restricts a park owner's ability to increase space rent whenever a mobilehome is transferred from one homeowner to another.

2. Whether the state court was correct in ruling that the City of San Marcos' Mobilehome Rent Review Ordinance is not a violation of federal substantive due process even though it restricts a park owner's ability to increase space rent whenever a mobilehome is transferred from one homeowner to another.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Palomar Mobilehome Park Association, a limited partnership and Respondent, City of San Marcos.

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No. 90-1824

In the Supreme Court

OF THE

United States

October Term, 1990

PALOMAR MOBILEHOME PARK ASSOCIATION,
A LIMITED PARTNERSHIP,
Petitioner,

VS.

THE CITY OF SAN MARCOS,
Respondent.

On Petition for a Writ of Certiorari
To The Fourth Appellate District,
Division One, Court of Appeal
For The State of California

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of San Marcos ("City") respectfully requests that this Court deny Palomar Mobilehome Park Association's ("Palomar") Petition for Writ of Certiorari ("Petition") seeking review of the California Court of Appeal opinion in this case. In the alternative, because the state court was so clearly correct in ruling that the San Marcos Rent Review Ordinance does not effect a federal taking nor violate federal substantive due process, the City respectfully suggests that the Supreme Court grant certiorari to clarify the taking issue and summarily affirm the judgment below; thereby resolving a matter of significant legal interest.

OPINIONS BELOW

On December 7, 1989, the California state trial court (San Diego Superior Court, Case No. N45074) issued its Order granting the City's Demurrer and Dismissing Palomar's Action. A copy of that Order appears in Appendix C to Palomar's Petition at C25-C27.

On February 6, 1991, the California Court of Appeal (Fourth Appellate District, Division One, Case No. D011484) issued its opinion affirming the Judgment of Dismissal. The opinion was not certified for publication, but appears in Appendix A to Palomar's Petition at A1-A23.

On April 17, 1991, the California Supreme Court (Case No. S019940) issued its one page ruling denying Palomar's Petition for Review and denying a request for an order directing that the Court of Appeal decision be published. The California Supreme Court ruling appears in Appendix B to Palomar's Petition at B24.

JURISDICTION

The Opinion of the California Court of Appeal, Fourth Appellate District, Division One, was entered February 6, 1991. On April 17, 1991 the California Supreme Court denied Palomar's Petition for Review. Palomar's Petition for Certiorari was docketed with the United States Supreme Court on or about May 28, 1991. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Section 1257.[1]

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[1]Although Palomar purported to invoke the Supreme Court's jurisdiction under 28 U.S.C. Section 1257 (federal question jurisdiction) (Petition at 4) at other places in its Petition Palomar seems to be trying to cast doubt on whether the federal questions had really been properly presented to the state courts. See, e.g., Petition at 26-39. As explained *infra*, page 9 at note 10, it is likely that Palomar is making this latter argument to avoid the res judicata/collateral estoppel effect of the state court's decision on its federal claims.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The California Constitution, Article I, Sec. 19, provides in pertinent part:

> Private property may be taken or damaged for public use only when just compensation, . . . has first been paid to, or into court for, the owner.

The California Mobilehome Residency Law (Cal. Civ. Code, Section 798 et seq.) governs many aspects of the relationship between a mobilehome park owner and a mobilehome owner residing on a rented space in a mobilehome park. Civil Code Section 798.55(a) contains legislative justification for the unique protections provided mobilehome owners. Protections include restrictions on terminating a space tenancy (e.g., Civil Code, Sections, 798.55(b), 798.56) and restrictions preventing a park owner, from interfering with or preventing a homeowner from selling his home to a new purchaser as long as the prospective homeowner has the financial ability to pay the space rent and does not have a prior history indicating that he or she will not comply with the rules and regulations of the park. (E.g., Civil Code, Section 798.74).

[California Civil Code, Sections 798.55, 798.56, 798.56(a), and 798.74 are set forth in Appendix D to Palomar's Petition at D28-D47.]

The San Marcos Municipal Code ("SMC"), Chapter 16.16. of Title 16 provides for review of space rental increases for mobilehome parks located within its jurisdiction. SMC, Section 16.16.010 sets forth the legislative

findings which justified enactment of the Ordinance. SMC, Section 16.16.055 provides that prior to increasing space rent, a park owner must notify both the City and homeowners. Rent review is initiated by the homeowners filing a petition signed by at least one homeowner from each of the more than 50% of the spaces in the park, SMC, Section 16.16.060(a). The filing of an adequate petition automatically stays the rent increase until the Mobilehome Rent Review Commission makes its decision, SMC, Section 16.16.060(d). At the rent review hearing, the park owner has the burden of proving by a preponderance of the evidence that the increase is reasonable and necessary to enable the park owner to receive a just and fair return on the owner's investment. SMC, Section 16.16.070(g). Pursuant to SMC, Section 16.16.080, all space rents are to be adjusted at the same time and not more than once a year.

[Pertinent portions of SMC sections 16.16.010, 16.16.055, 16.16.060, 16.16.070 and 16.16.080 are set forth in the Appendix to this Opposition at A1-A3.]

STATEMENT OF THE CASE

A. Background

The City of San Marcos is located in Northern San Diego County in the State of California. It has a substantial number of mobilehome parks and mobilehome owners located within its boundaries.[2]

In April 1978, the City Council of the City of San Marcos enacted Ordinance 78-462 establishing a

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[2]The October 19, 1990 report by the California Department of Housing and Community Development listed 14 mobilehome parks and 2,723 mobilehome spaces in San Marcos. The March 27, 1990 County of San Diego "County Wide Mobilehome Task Force Final Report" found that 80% of the mobilehome spaces in the County were occupied by "senior households" who are "generally small elderly families with fixed incomes." *Id.* at 5.

Mobilehome Rent Review Commission to review proposed mobilehome space rent increases.[3] Although over the years there have been several amendments,[4] the Rent Review Ordinance ("Ordinance") has continued in force to the present date.

In November 1986, San Marcos annexed the Palomar Mobilehome Parks into the City of San Marcos.[5] As a result they became subject to the provisions of the Ordinance.

Until early 1989, the Ordinance and particularly SMC section 16.16.080 (see Appendix to this Opposition at A3) had been interpreted as *not* prohibiting a park owner from increasing the space rent when a mobilehome was transferred to a new homeowner. However, in February 1989, the City formally clarified its interpretation of that provision to strictly apply the park-wide one time per year adjustment restriction, thus, mandating continuation of existing space rent to a new resident subject, of course, to the park owner's ability to seek an annual increase pursuant to the provisions of the Ordinance.[6]

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[3]The Ordinance found that the shortage of mobilehome spaces, the low vacancy rates in mobilehome parks, and the cost and difficulty of relocating mobilehomes had created a great imbalance in the bargaining position of park owners and homeowners in favor of the park owners. See, SMC Section 16.16.010, Appendix to this Opposition at A-1.

[4]The application of an earlier version of this Ordinance was reviewed and upheld by the state Court of Appeal in *San Marcos Mobilehome Park Owners Ass'n. v. City of San Marcos,* 192 Cal.App.3d 1492, 238 Cal.Rptr. 290 (1987).

[5]Petitioner Palomar owns and operates two adjacent mobilehome parks, Palomar Estates East, a 371 space park, and Palomar Estates West, a 472 space park.

[6]In September 1990, after Palomar's suit had been dismissed at the state trial court level, the City enacted Ordinance 90-862 which added SMC section 16.16.085(c) providing that on a sale, a park owner may increase space rents based on the lower of the percentage change in

B. Procedural History

1. The State Superior Court Ruling.

On September 14, 1989, Palomar filed a Complaint in the San Diego Superior Court seeking injunctive and declaratory relief alleging that the Ordinance was unconstitutional because it did not permit a park owner to automatically increase rents when a mobilehome was sold or transferred. In addition, the Complaint sought $45,000,000 in money damages for the alleged taking of the park owner's property. Relying on *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), Palomar alleged that the Ordinance constituted a "taking" under state and federal law because allegedly it permitted residents to obtain a higher price (premium) on the sale of their mobilehome in a rent controlled park as compared with the price similar homes sold in a non-rent controlled park. Palomar further contended that the Ordinance was "irrational" because it allegedly allowed the residents to sell their mobilehomes for a "premium" thereby increasing the sales prices to the detriment of low cost and affordable housing.

City responded by demurring both generally and specially and moving to strike portions of the Complaint. On December 7, 1989, the Honorable Robert J. O'Neill, Judge of the San Diego Superior Court issued an Order sustaining the City's Demurrer to the Complaint, without

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the CPI since the last rent increase or the median rent levels for comparable spaces in the park, all subject to a maximum rental increase of 10%. The Ordinance further provided that if the park owner is dissatisfied with the increase, the owner may request that the fair market rent for the space be established by arbitration. See, Appendix to this Opposition at A4-A7.

In light of the enactment of Ordinance 90-862, it is arguable that Palomar's claims for injunctive and declaratory relief are moot and Palomar's claims for alleged damages, if not also mooted, have been severely limited.

leave to amend, finding that Hall was neither binding nor persuasive to establish a "per se" taking[7] and that Palomar did not and could not allege deprivation of all use of its property to establish a regulatory taking. On its own motion, the Court dismissed the entire action with prejudice.[8] See, Order, Appendix C to Palomar's Petition at C25-C27.

2. The State Court of Appeal Ruling.

On January 8, 1990, Palomar timely filed its Notice of Appeal with the State Court of Appeal. Following briefing, oral argument was waived and the matter was taken under submission.

On February 6, 1991, in an unpublished decision (*Palomar Mobilehome Park Ass'n. v. City of San Marcos,* 4th Dist. Div. One, No. D011484 (see, *Palomar* Slip. Op., Appendix A to Palomar's Petition at A1-A23); the Court of Appeal noting that the same "taking" arguments had recently been rejected in *Yee v. City of Escondido,* 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990) [*pet. for review denied,* 1991 Cal. LEXIS 353, January 24, 1991], and *Peppard v. City of Carpinteria,* [temporarily reported at 226 Cal.App.3d 812, 278 Cal.Rptr. 100 (1991)][9] (*Palomar* Slip. Op., Palomar's Petition at A-8) once again reaffirmed the conclusions it had reached in *Oceanside Mobilehome Park Ass'n. v. City of Oceanside,* 157 Cal.App.3d 887, 906-907, 204 Cal.Rptr. 239 (1984), that an increase in the value of mobilehomes where rent

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[7]Palomar had not alleged that it had requested a rent increase and had been denied a just and reasonable return on its investment.

[8]The Court also ruled that under the circumstances, the City's special demurrers and motion to strike were moot.

[9]On March 21, 1991, the California Supreme Court denied a Petition for Review in *Peppard* and ordered the Court of Appeal opinion depublished. See, *Peppard v. City of Carpinteria,* 1991 Cal. LEXIS 1293 (1991).

control has been imposed does not constitute a "taking" of property from the park owner. *Palomar* Slip. Op., Palomar's Petition at A10-A11.

The Court pointed out that "[a]bsent a contention it is precluded from charging sufficient rent to obtain a reasonable return from its investment, Palomar's claim that the vacancy control allows the tenant to extract a 'premium' from the sale of his mobilehome is irrelevant to the taking issue presented here." *Id.* at A10-A11.

The Court then examined *Hall, supra,* and *Pinewood Estates v. Barnegat Township Leveling Bd.* 898 F.2d 347 (3rd Cir. 1990), found them unpersuasive and their reliance on *Loretto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), misplaced and superseded by a subsequent United States Supreme Court decision, *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). *Palomar* Slip. Op., Palomar's Petition at A11-A20.

The Court also examined Palomar's substantive due process claims and concluded:

> Palomar's allegations do not dispute that the vacancy control protects the purchasing tenant from excessive rent, which is a legitimate state interest, and which interest is not defeated by the alleged fact of an increase in the cost of the coach. Since there is no contention the vacancy control does not reasonably relate to the legitimate interest of preventing excessive rents, any challenge to the wisdom of the measure based on the cost of the coaches is a policy question for the Legislature, not the courts.

Id. at A-22.

3. The California Supreme Court's Denial of Review.

On March 11, 1991, Palomar filed a Petition for Review with the California Supreme Court. On April 17, 1991, the California Supreme Court denied Palomar's request for Review.[10] See Ruling, Appendix B to Palomar's Petition at B24.

WHY THIS WRIT SHOULD BE DENIED OR IF GRANTED WHY THE JUDGMENT BELOW SHOULD BE AFFIRMED

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED PALOMAR'S TAKING CLAIM

Palomar apparently bases its argument for granting this Writ of Certiorari on United States Supreme Court

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[10]On February 2, 1991, Palomar filed a Complaint in the United States District Court for the Southern District of California. *Palomar Mobilehome Park Ass'n. v. City of San Marcos,* S.D. Cal., No. 91-0157 B (IEG). In its federal suit, Palomar raised essentially the same claims it had raised in the state suit contending that the City's Ordinance was both a public and private "taking" and violative of substantive due process under the Fifth and Fourteenth Amendments and 42 U.S.C. Section 1983 and Section 1985. The City responded with a motion to dismiss under F.R.C.P. Rules 12(b)(1) and (6) for lack of jurisdiction and for failure to state a claim primarily arguing that the federal suit was barred by res judicata/collateral estoppel based on the state court rulings on the same claims.

On June 6, 1991, the Honorable Rudi Brewster, United States District Judge, issued a Judgment of Dismissal. Judge Brewster found that Palomar's federal constitutional issues had been fully litigated and that the state court ruling was a valid final judgment on the merits. After noting that federal district courts are courts of original not appellate jurisdiction, the Court concluded that the proper forum for review of the state court judgment was the United States Supreme Court not the United States District Court, citing *Rooker v. Feldman* 263 U.S. 413, 415-416, 44 S.Ct. 149, 68 L.Ed.2d 362

Rule 10(b) contending that the Palomar state court decision conflicts with two federal appellate court decisions, *Hall, supra,* and *Pinewood, supra.* In fact, the Court below fully considered both decisions and found them distinguishable and against the weight of authority as set forth in subsequent federal and state court rulings.

A. The Hall Rationale Has Been Undermined By Subsequent Cases.

1. The Hall Ninth Circuit Panel Decision.

In August 1984, the City of Santa Barbara enacted a mobilehome rent control ordinance. One of the key provisions required "mobile park operators to offer their tenants leases of unlimited duration." 833 F.2d at 1273. The Halls filed suit in federal district court claiming that by giving the tenants such a "perpetual lease" at a below market rental rate, the ordinance transferred to the tenants a possessory interest in the Halls' land. They alleged the prices of the mobilehomes increased after enactment of the ordinance and that this increase reflected a "taking" from the park owner. 833 F.2d at 1274. After reviewing those allegations, the District Court granted the City's Motion to Dismiss. *Ibid.*

On appeal, a Ninth Circuit panel reversed. After discussing both "regulatory taking cases" (e.g., *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct.

(1923) and *District Court of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 484-485, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

Much of Palomar's effort on this Petition (e.g., "Questions Presented," Nos. 3 and 4 (Petition ii); "Argument", "The federal claim did not even exist at the time the state court purported to dispose of it" (Petition 26-39); and "Conclusion", "to remand to the owner court with instructions to limit its decision to state constitutional issues," (Petition 44)) is apparently designed to circumvent such a federal district court res judicata ruling. Before receiving what it now considers an adverse ruling from the state courts, Palomar made no attempt to reserve its federal claims from state court adjudication.

2646, 57 L.Ed.2d 631 (1978), *reh. den.*, 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978), and "physical occupation cases" (e.g., *Loretto v. Teleprompter Manhattan CATV Corp., supra*, the panel concluded "when viewed in the light most favorable to the Halls" the allegations seemed to present a claim for taking by physical occupation. 833 F.2d at 1276. Pointing out that the ordinance directed the landlord to give the tenant an indefinite lease, the panel concluded "[t]he right to occupy property in perpetuity is surely the type of property that is protected by the taking clause." *Ibid.*

After pointing out that the Santa Barbara Ordinance had apparently been enacted solely to alleviate "a critical shortage of low and moderate housing," the panel also indicated that it had significant doubts that the Ordinance was rationally related to that end. 833 F.2d at 1280-81.[11]

[It is unfortunate that at the time the *Hall* panel made its decision it was apparently unaware of the discussion of similar claims in *Oceanside, supra,* 157 Cal.App.3d at 906-907. There, the Court in upholding the Oceanside Mobilehome Rent Review Ordinance specifically dismissed an argument that the combined effect of Mobilehome Residency Law and the local ordinance constituted a taking merely because "a selling tenant with a favorable rent controlled lease may be able to sell the onsite mobilehome for a higher price than can be obtained for the identical mobilehome situated in an unregulated park." *Ibid.* Had the Ninth Circuit been aware that *Oceanside* had previously considered and decided the same claim, it may have ruled quite differently.][12]

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[11]The panel also indicated their feelings toward rent control in general by questioning its overall rationality. See, 833 F.2d at 1281n.26.

[12]For example, the *Hall* panel described the Halls' claim as being "novel." 833 F.2d at 1273. Later after examining several rent control

2. The Dissent From Denial Of Rehearing.

The *Hall* panel denied a petition for rehearing. 833 F.2d at 1281. A suggestion for rehearing en banc was also rejected, with three Circuit Judges dissenting. *Ibid.* The three dissenters correctly treated the rent control ordinance as an economic regulation and pointed out that the ordinance was similar to three rent control cases that the Supreme Court had dismissed as lacking a substantial federal question[13] and concluded *"The panel decision is thus contrary to controlling authority."* 833 F.2d at 1282 [emphasis added].

The three dissenters pointed out that the panel's rationality argument was flawed and that, because a Court does not have the power to sit as a "superlegislature," legislation passes constitutional muster if the legislature could have concluded that its action would promote a legitimate state interest. 833 F.2d at 1284.[14]

The City of Santa Barbara's Petition for a Writ of Certiorari was denied. See, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

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cases, the panel stated: "In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferrable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." 833 F.2d at 1278.

[13]See, *Fisher v. City of Berkeley*, 471 U.S. 1124, 105 S.Ct. 2653, 86 L.Ed.2d 270 (1985); *Nash v. City of Santa Monica*, 470 U.S. 1046, 105 S.Ct. 1740, 84 L.Ed.2d 807 (1985); *Fresh Pond Shopping Center v. Callahan*, 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983).

[14]The Dissenters also correctly predicted that the Hall panel decision ". . . is an authorization for broad, wholesale attacks upon rent control regulation. It casts a shadow upon all economic regulation. Our court must now sit idly by and watch taxpayer's money and court time being expended in litigation over the effects of this decision." 833 F.2d at 1284.

3. FCC Undermined The *Hall* Rationale By Finding No Taking Where A Property Owner Had Voluntarily Entered Into A Lease Subject To Rent Regulation.

Subsequent to the *Hall* panel's decision, the Supreme Court decided *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). There, this Court dismissed a utility's argument that a federal statute which authorized the FCC to determine the rates which it could charge a cable TV system for the use of its poles constituted a "taking." The Court pointed out that the statute did not require the utility to rent its poles but merely regulated the rents charged once it had decided to rent. 480 U.S. at 251. The Court noted that unlike *Loretto, supra,* the public utility landlords had *voluntarily* entered into the leases with cable company tenants stating:

> [I]t is the invitation, not the rent which makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government lease.

Id. at 252-253.

The Court after also reiterating that, "statutes regulating the economic relations of landlord and tenants are not *per se* takings," dismissed the contention that the rent regulation was a taking. *Ibid.*

4. Pennell Rejected *Hall's* Rationale And Upheld The Rationality Of A Rent Control Ordinance Which Considered Tenant Hardship.

In *Pennell v. City of San Jose,* 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), this Court in upholding San Jose's rent control ordinance, not only refused to declare rent

control a "per se" taking[15] (see (see, 485 U.S. at 12n.6), but also rejected the landlord's due process argument that the only legitimate purpose of the statute was to prevent rent increases caused by housing shortages and that the objective of alleviating individual tenant hardship was not a policy that the legislature was free to adopt in a rent control ordinance. 485 U.S. at 12.

The Court pointed out that "a legitimate and rational goal of rate regulation is the protection of consumer welfare", and the consideration of tenant hardship as a factor to be considered in determining rent increases "represents a rational attempt to accommodate the conflicting interests of adjudicating tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." 485 U.S. at 13.

5. Eamiello And Thompson Rejected The *Hall* Rationale And Upheld The Rationality Of A Statute Designed To Protect The Economic Interest Of Mobilehome Owners In Selling Their Homes On Site.

Eamiello v. Liberty Mobile Home Sales, 208 Conn. 620, 546 A.2d 805 (1988), *app. dism.*, 489 U.S. 1002, 109 S.Ct. 1104, 103 L.Ed.2d 169 (1989), also examined the *Hall* rationale and rejected its reasoning. There, the park owner, relying upon *Hall*, argued that a state statute which permitted a homeowner to sell his mobilehome on site was unconstitutional and constituted a "taking." 546 A.2d 815. The Connecticut Court after reviewing *Hall* declined to apply its rationale. 546 A.2d 816. It concluded that the statutory restrictions on the right of the park owner to control the term of the lease and the identity of

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[15]The Amici Briefs (available on LEXIS) urging such action relied in great part on the *Hall* panel dicta (see, e.g., 833 F.2d at 1281n.26) that rent control should be considered a "per se" taking.

the lessee was not sufficiently analogous to a physical occupation of the property to violate the federal "takings" clause. Second, it determined that there were significant differences between the Connecticut mobilehome statute[16] and the Santa Barbara Ordinance. *Ibid.* The Court after reviewing *Loretto*, *FCC*, and *Fresh Pond*, distinguished *Loretto*, pointing out that a mobilehome owner's right to occupy a mobilehome space was originally obtained "consensually" indicating that in entering into such a lease the park owner has transferred his "possessory interest" in the land to the homeowner in return for rents.[17] *Id.* at 818.

After noting that often, due to restrictive zoning, park owners have a "monopoly" (*Id.* at 819), the Court continued and pointed out mobilehome owners had a substantial investment in their homes[18] and allowing an on-site sale "serves a substantial public purpose in protecting the

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[16]While Connecticut General Statute Section 21-79 is not a rent control statute, it does provide a form of "vacancy control." It concludes with the following words: "No owner shall exact a commission or fee with respect to the price realized by the seller, unless he has acted as agent for the seller on a sale pursuant to a written contract, *or charge a rent for the mobile manufactured home space or lot upon which the purchased mobile manufactured home is located greater than the prevailing rate for any other space or lot located in the park.*" [emphasis added]

The first clause is similar to Cal. Civil Code Section 798.72 (Park owner cannot charge a *fee* to either a homeowner or prospective homeowner on change of ownership unless he performed a service). The second clause is similar to the San Marcos Ordinance in that it puts limits on the right of park owners to raise *rents* upon vacancy.

[17]The Court concluded that the restrictions put on the park owner's right to reject a transferee were quite similar to the common provision that a landlord may not unreasonably withhold his consent to the assignment of a lease by a tenant. See, 546 A.2d at 818.

[18]*Manheim*, "Tenant Eviction and the Taking Clause," 1989 Wisc.L.Rev. 925, 956n.179, notes that modern mobilehomes often cost between $30,000 and $75,000.

economic interests of mobilehome tenants in selling their homes on site." *Id.* at 819. After noting that there, the homeowner's home had been purchased for $12,500, and was worth $17,000 if sold on site but only $3,500 if it had to be moved, the Court concluded that the statute "protects tenants at mobilehome parks from being forced to sell to park owners at a substantial loss and as a consequence benefits many low income people who cannot otherwise afford to purchase a more expensive home." *Ibid.*

The Court recognized that the state statute which restricted rent increases on transfer might result in the homeowner receiving a greater price for his home because of the statutory right of the purchaser to continue occupancy of the site, but, nevertheless, upheld the statute concluding that because the state had created the site value through regulatory scarcity (e.g., zoning) it could constitutionally repose any sales premium in the homeowner rather than the park owner. *Id.* at 820.

The Court concluded:

> In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising form the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, Section 21-79 strikes a reasonably fair balance between the economic interests of mobile home tenants and those of mobile home park operators.

Ibid.

In *Thompson v. Merlino Enterprises*, 208 Conn. 656, 545 A.2d 1094 (1988), *app. dism.*, 488 U.S. 1024, 109 S.Ct. 829, 102 L.Ed.2d 962 (1989), the Connecticut Court relying on *Eamiello, supra*, upheld the right of an administrator of an estate to sell a mobilehome on site recogniz-

ing that the home had a value of $11,000 if sold on site and almost no value if sold off site. See, 545 A.2d at 1097.

6. *Sperry* Indicates That A Mere Loss Of Money Is Not A Physical Taking.

More recently, in *United States v. Sperry Corp.*, 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989), this Court held that a statute which required American claimants to pay the United States a percentage of the monetary rewards made by the Iran-United States Claims Tribunal was neither a "taking" nor a violation of the due process clause. In so doing, this Court, reversed the Court of Appeals which held that the payment was a "permanent physical occupation" of property and therefore a "per se taking" under *Loretto, supra,* stating:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case was a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto.*

110 S.Ct. at 395n.9.

Here, as in *Sperry,* and unlike *Loretto,* there is no new physical property that is being occupied due to the ordinance. As in *Sperry,* the only difference is that without the ordinance, the park owner might have been able to obtain more money or profit.[19]

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[19]See, Note, "The Constitutionality of Rent Control Restrictions on Property Owner's Dominion Interests", 100 Harv. L. Rev. 1067, 1084n.106 (1987) (Note concludes there was no indication that the ordinance in *Hall* frustrated any interest of the plaintiffs other than

Because *Sperry* holds that mere economic loss is not sufficient to constitute a "physical taking", one of the last underpinnings of the *Hall* panel's rationale has been undermined.

7. The Third Circuit's Decision In *Pinewood* Is Also Flawed Because It Failed To Consider Binding And Relevant Authorities.

In *Pinewood Estates of Michigan v. Barnegat Township Leveling Board, supra,* the park owner sued in federal court[20] alleging that the rent leveling ordinance of the Township of Barnegat, New Jersey took their property by prohibiting them from increasing rents to a new mobilehome owner who bought the mobilehome, in place, from an existing resident. The District Court granted a Motion to Dismiss holding that the ordinance was a constitutional regulatory ordinance. 898 F.2d at 350.

On appeal, a Third Circuit panel reversed, holding that to the extent that the ordinance granted the homeowners a transferable possessory interest in the park owners

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the desire for greater profits). See also, *Manheim, supra,* 1989 Wisc L. Rev. at 964-969 (Questioning the *Hall* panel's conclusion that a right to raise rents on transfer is a discrete property interest).

[20]It is unclear whether or not the federal court had proper jurisdiction over the case. The Complaint apparently alleged a "taking", therefore, it should have been brought in state court, assuming that New Jersey has adequate procedures for such inverse condemnation cases. See generally, *Williamson County Regional Planning Comm'n. v. Hamilton Bank,* 473 U.S. 172, 196-197, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

See also, *Sinaloa Lake Owner's Ass'n. v. City of Simi Valley,* 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990), explaining that it was proper for *Hall* to be brought in the federal courts because it was originally filed at a time, prior to *First English [First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)], when California state courts would not award damages for ordinances which constituted a taking.

land, it constituted a "physical taking" under *Loretto, supra. Id.* at 353-354.[21] After opining that "vacancy decontrol" might solve the problem by permitting the park owner to raise rents to eliminate any "premium" *(Id.* at 353), the Court dismissed the argument that the park owners were being adequately compensated for their loss because the ordinance provided them with a "constitutionally adequate rent for the occupancy of the tenants as such." *Ibid.*

A careful analysis of *Pinewood* indicates that the Court apparently never considered a number of relevant decisions, e.g., *FCC, Pennell, Eamiello, Thompson, Sperry,* and *Oceanside, supra.*

Therefore, the *Pinewood* Court apparently never considered that, unlike *Loretto,* a mobilehome owner's right to occupy a mobilehome space is originally obtained "consensually" (*FCC, supra,* 480 U.S. at 252); that a park owner transfers his "possessory interest" in his land to the mobilehome owner in return for rents (*Eamiello, supra,* 546 A.2d at 818), and that since the state has created the site value through regulatory scarcity (e.g., zoning) it could constitutionally repose any sales premium in the homeowner rather than the park owner. *Eamiello, Id.* at 820.

They failed to consider that the only park owner's "property interest" frustrated by the ordinance was his desire for greater profits and that such an interest does not qualify for a physical taking. See, *Sperry, supra,* 110 S.Ct. at 395n.9.

The *Pinewood* panel's comments about the desirability of "vacancy decontrol" clearly indicated that they were unaware that "mobilehome owners are enclosed within a captive market" *(Oceanside, supra,* 157 Cal.App.3d at

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[21]The Court also noted that *Hall, supra,* had reached a similar conclusion. 898 F.2d at 353-354.

910); that "park owners have a monopoly," (*Eamiello, supra*, 546 A.2d at 819) and that "taken collectively the [mobile] homeowners have a greater investment than does the [mobile] home park owner", *Oceanside, supra*, 157 Cal.App.3d at 911n.9. The Court, therefore apparently never considered the public interest in protecting the mobilehome owner's investment. See, *Eamiello, supra*, 546 A.2d at 819; see also, *Palomar* Slip Op., Palomar's Petition at A19-A20n.6 (Vacancy control prevents a park owner from charging excessively high rents and thereby artificially deflating the price of the mobilehome).[22]

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[22]By requiring that space rent not be arbitrarily increased upon the sale of a home or occurrence of a space vacancy, the San Marcos Ordinance adds certainty to the mobilehome market, prevents abusive rents which result in a destruction of the equity that a homeowner has in his or her home, stabilizes rents among spaces in a park, and assures continuation of mobilehome living as a legitimate housing option.

The grim reality of what happens when arbitrary increases are made on transfer is only recently becoming public. On remand from the Ninth Circuit decision, the Halls were able to convince the trial court that there was a rent control sales premium and received a substantial damage award. Prior to appeal to the Ninth Circuit, the case settled when the City of Santa Barbara agreed to lift all restrictions on rent increases at the time of transfer. Almost immediately, Mrs. Hall informed certain park residents that she was going to raise rent on any transfer by $250 to $300 per month. As a result, homes which a few months before had been purchased for $80,000 became virtually unsalable.

For example, Mrs. Hall's attorney, Mr. Jagiello, has publicly stated: "... in the Hall park over the last two years, not one coach has sold, although many are for sale, but for the exception of a coach that sold two weeks ago for one dollar. There were attempts to give coaches away to charities and they wouldn't take them. There is no market for coaches in Santa Barbara." See, Administrative Record to *Palomar Estates East v. City of San Marcos*, San Diego Superior Court No. N48882, April 9, 1990 Hearing Transcript at 7.

It is clear that in the absence of vacancy control certain unscrupulous park owners will take much more than the so called "rent control

B. Every California Court Which Has Considered The Issue Has Rejected The *Hall* Rationale.

1. *Yee* Fully Considered *Hall* And Dismissed Similar Claims.

In *Yee v. City of Escondido, supra,* the Court considered an attack on the City of Escondido's Mobilehome Rent Protection Ordinance alleging that the Ordinance constituted a taking and a denial of substantive due process because it did not permit a park owner to automatically raise rents when a mobilehome was sold or transferred.

In affirming the trial court's order dismissing the action, the Court began by indicating that it was "revisit[ing] an issue of federal constitutional law we first considered several years ago in *Oceanside*. . . ." *Yee*, 224 Cal.App.3d at 1351. The Court then pointed out that:

> "[p]laintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking." The fact that used mobilehomes in Escondido are selling for more than they have in the past is irrelevant."

224 Cal.App.3d at 1354.

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premium" they will take "all the market can bear," that is all the homeowner's equity. Thus, a homeowner who in good faith invested in a home, recognizing the reality that the home could not be moved, under the *Hall* theory is faced with the prospect of losing the value of his or her investment or remaining a captive in the mobilehome park.

Unless homeowners and their lenders are assured that the value of a home will remain relatively stable, the mobilehome market will evaporate, investments will be lost, and a legitimate affordable housing option will be lost.

The Court then examined *Hall* and its legal underpinnings and concluded that *Hall* was "an interpretative misstep" (224 Cal.App.3d at 1351n.1),[23] had misapplied *Loretto, supra*, and was inconsistent with subsequent decisions of the United States Supreme Court including *FCC, supra*. *Yee*, 224 Cal.App.3d at 1354-1358.

The California Supreme Court denied hearing in *Yee* on January 24, 1991. See, 1991 Cal. LEXIS 353 (1991). The time for Yee to file its Petition for a Writ of Certiorari has been extended (per. J. O'Connor) to June 23, 1991.

2. *Casella* Rejected Virtually Identical Claims.

In *Casella v. City of Morgan Hill*, ____ Cal.App.3d ____, 280 Cal.Rptr. 876, 1991 Cal.App. LEXIS 473 (Cal.App., 6th Dist. No. H006972, May 10, 1991, certified for publication), the Court rejected a challenge to the City of Morgan Hill's mobilehome rent control ordinance claiming that its lack of a "vacancy decontrol" provision which allows rents to be increased when a mobilehome is transferred was a "taking." After carefully analyzing the *Hall* decision (*Casella*, Slip. Op. at 8-13), the Court concluded:

> We find *Hall* distinguishable in a way we think the Supreme Court would find material. (833 F.2d at p. 278) Like the California appellate district which has considered the issue before us (see *Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349), we repudiate *Hall's* attempt to bootstrap a mobile home rent control ordinance — an economic regulation — to the Supreme Court's "very narrow" holding in *Loretto*.

Id. at 13.

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[23]Yee also concluded that Pinewood "suffers from a similar defect." 224 Cal.App.3d at 1356n.6.

The Court continued its analysis stating:

> As *Yee* and others have pointed out, the increase in the sales prices of mobile homes resulting from rent control may simply reflect the artificially low price caused by excessive rents charged prior to its enactment. The mere fact that increased coach prices are a corollary to rent control does not establish that a taking has occurred. . . .

Id. at 17.

Finally, the Court rejected Hall's analysis of substantive due process by concluding:

> The stated purpose of the city's ordinance is to control excessive rental prices for the largely fixed-income residents of mobile home parks. This is unquestionably a legitimate state interest. The City of Morgan Hill could reasonably have concluded that the mobile home rent control ordinance would promote this goal. Whether as a means to achieve its stated purpose rent control is a good idea is a political decision — one which properly rests with the legislative branch of government. We agree with *Yee* that this is "not a question of constitutional law for the courts."

(*Casella*, Slip Op. at 22-23).

C. In Any Event, The San Marcos Ordinance Is Distinguishable From That Considered In Hall.

The Santa Barbara Ordinance discussed in *Hall* put various restrictions on a park owner's right to terminate a mobilehome owner's space lease and required mobilehome park owners to offer leases of unlimited duration. See *Hall, supra*, 833 F.2d at 1273.

There are no similar restrictions in the San Marcos Ordinance. To the extent that the homeowner "tenants" are given the right to occupy and use the park that right

is granted not by the San Marcos Ordinance, but instead by state law. See, Mobilehome Residency Law, Cal. Civil Code, Sections 798.56, 798.74. This fact by itself is sufficient to distinguish *Hall.*

The Court of Appeal recognized this distinction and pointed out that on appeal Palomar was relying on the "combined effect of the rent control ordinance and the California Mobilehome Residency Law" . . . . "[but] is not challenging the constitutionality of the state law, asserting that even absent the state law, the local rent control ordinance would achieve a taking." *Palomar* Slip. Op., Palomar's Petition at A6-A7.

Later the Court explained:

> As we noted earlier, Palomar is *not* challenging the State law requirement that it accept the new purchasing tenant chosen by the selling tenant — thus this component of the regulatory scheme does not bring this case into the "permanent physical occupation" parameters of *Loretto.* As explained by Palomar, even if the landlord had exclusive power to chose [sic] the new tenant, under the local ordinance it still would be subject to the rent increase restrictions. Thus, it is not the physical occupation of the new tenant which is being challenged, but rather the challenge is to the limits on the rent increases and corresponding effect on the price of the selling tenant's coach. And, contrary to the analysis used in *Hall,* this is not a case which challenges the transfer of a possessory interest from landlord to tenant, since even if the landlord retained the right to choose the purchasing tenant, Palomar would still be complaining about the restriction on rent increases at vacancy and the corresponding increase in the value of the mobilehome sold by the departing tenant.

Id. at A16-A18.

Under the circumstances, the Court of Appeal correctly concluded that the Ordinance granted no "permanent physical occupation" within the meaning of *Loretto* (*Palomar* Slip. Op., Petition at A18-A19) and therefore *Hall* was also distinguishable on its facts.

II. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THAT THE ORDINANCE ADVANCES A LEGITIMATE GOVERNMENTAL PURPOSE AND DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

Palomar also contended that the Ordinance violates substantive due process because its vacancy control provision[24] does not advance a legitimate governmental purpose.

The San Marcos rent control legislation expressly seeks to remedy an inequitable market situation caused by the scarcity of mobilehome spaces by protecting mobilehome owners from unreasonable space rental increases therefore protecting the homeowner's investments, while also providing park owners with a just and reasonable return on the park owner's investment. See, SMC, Section 16.16.010.

The Courts have found rent control legislation to be a reasonable and legitimate means of addressing problems related to scarcity in rental property and the high rents resulting from inequities in bargaining power. See, e.g., *Pennell, supra*, 485 U.S. at 13-14 (Court upheld rent control ordinance which required consideration of hardship to low income tenants of rent increase); see also, *Schnuck v. City of Santa Monica*, ____ F.2d ____, 1991 9th

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[24]Throughout its Petition Palomar often refers to the restrictions on its right to raise rents on transfer as a "vacancy control" provision. Although some courts have also used this terminology, it is a misnomer because since mobilehomes are almost always sold "in place", there is rarely a space "vacancy."

Cir. Slip. Op. 6877, 6885, 1991 U.S. App. LEXIS 11113 (9th Cir. No. 89-55283, June 4, 1991) (Court held City had a legitimate interest in imposing eviction controls as part of rent control ordinance to "protect tenants from the high cost of dislocation in the tight housing market, and prevent landlords from arbitrarily evicting tenants simply to obtain higher rents from new tenants.").

In *Oceanside, supra*, the homeowner's equity interest was interrelated with mobilehome rent control. There, the Court noted that "the ordinance recognizes not only the realities of a captive market, but also the proprietary interests mobilehome owners have individually and cumulatively in their homes and appurtenances." *Id.* at 910-911.[25]

In *Azul Pacifico v. City of Los Angeles*, 740 F.Supp. 772 (C.D. Cal. 1990), *on appeal*, 9th Cir. No. 90-55853, the District Court reached a similar conclusion. Although the Court considered itself bound by *Hall* to find a "taking" (*Id.* at 781), it nevertheless set forth its conclusion that a legitimate state interest justified the City's enactment of the Rent Stabilization Ordinance ("RSO") including the "vacancy control" provisions. *Id.* at 780. The Court noted:

> Based on testimony from mobile home tenants, the City found that, without vacancy control, it would be virtually impossible for tenants to sell their homes on the pad because landlords could raise the rents to a level that prospective buyers could not afford.

Ibid.

Pointing out that "the Supreme Court has long held that protection of consumer welfare is a legitimate and rational goal of price control" (*Ibid.*), and that rent

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[25]In an accompanying footnote, the Court noted that "the continuing possibility of unreasonable space rental increases in manufactured home parks threatens to diminish the value of the investment of the manufactured home owners." 157 Cal.App.3d at 911n.9.

control has long been held constitutional as "a legitimate exercise of the state's police power" (*Id.* at 781), the Court determined that "the mobile home market is an example of a monopoly, which is a market *failure*, rather than a market, and is a prime candidate for governmental regulation." *Ibid.*

The Court below properly ruled that the Ordinance advances a legitimate purpose and is not a violation of substantive due process.

CONCLUSION

To the extent that Palomar's Petition seeks to raise issues never presented below, i.e., whether the federal claim did not exist at the time the state court ruled (see, Palomar's Petition at 26-39), it should be summarily denied. See, e.g., *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) (Traditionally the Court refuses to "decide federal constitutional issues raised here for the first time on review of state court decisions").

Respondent City also respectfully submits that the Court should deny Palomar's Petition seeking review of the taking and due process decisions of the state court because it is clear that these decisions were properly made.

However, Respondent recognizes that this case raises an important issue of "taking jurisprudence", i.e., whether a "taking" exists in the context of the regulation of space rent to new residents in a mobilehome park.[26] Therefore in the alternative, Respondent City respectfully suggests that if this Court decides that the petition presents an important issue justifying a grant of certiorari, review should be limited to consideration of the taking issue. Further, Respondent respectfully suggests that a grant of certiorari and a decision summarily affirming the state court decision would remove the

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[26]Counsel for Respondent are aware that the issue of whether a mobilehome rent review ordinance which prevents or restricts rent increases on the sale of a mobilehome in place in a park is a "taking" is of major concern to many cities and other local governments, mobilehome park owners and mobilehome residents throughout California and perhaps the nation. For example, at its June 14, 1991 meeting the Legal Advocacy Committee of the League of California Cities voted to support the request by the City of San Marcos for a limited grant of certiorari to decide the taking issue, and further to support the City by means of an Amicus Brief if certiorari is granted.

"shadow" cast by *Hall* on mobilehome living as a legitimate affordable housing option and prevent further wasteful litigation on this issue.[27]

Dated: June , 1991

Respectfully submitted,

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[27]Palomar is but the first of a series of possible petitions based on the same fact pattern. Several other cases in which *Hall* type challenges have been raised to local mobilehome rent review ordinances are currently at some stage of the state (e.g., *Yee*, *Peppard*, *Casella*, *supra*) or federal (e.g., *Azul*, *supra*) appellate process and may ultimately reach this Court.

APPENDIX

Pertinent portions of San Marcos Municipal Code, Chapter 16.16:

Section 16.16.010. Findings.

Since the mid 1970's there has existed within the City of San Marcos and surrounding communities, a shortage of rental space for the location of mobilehomes. Due to the continuing shortage of available mobilehome rental spaces, there continues to be very low vacancy rates within mobilehome parks creating an inequitable market situation between mobilehome park owners and the tenants thereof. Prior to the enactment of regulations controlling space rent increase, space rents had been rising for several years and were being increased in amounts and at frequencies that caused serious concern, anguish, and stress among a substantial number of San Marcos residents living in mobilehome parks.

Finding alternative rental sites for the relocation of mobilehomes have been and continue to be difficult due to the shortage of vacant rental spaces, the restrictions on the age, size, or style of mobilehomes permitted in many mobilehome parks, and the requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation. Additionally, the cost for moving a mobilehome is substantial and the risk of damage in moving is significant. The result of these conditions has been and continues to be the creation of the great imbalance in the bargaining position of the mobilehome park owners and mobilehome owners in favor of the mobilehome park owners pertaining to the establishment of space rents.

This Council finds and declares it necessary to facilitate and encourage fair bargaining between mobilehome owners and mobilehome park owners in order to achieve mutually satisfactory agreements regarding space rental

rates in mobilehome parks. Absent such agreements, this Council further finds and declares it necessary to protect the mobilehome owner and resident from unreasonable space rental increases while at the same time recognizing the need of mobilehome park owners to receive a just and reasonable return on their investments.

Section 16.16.055. Notice of Rent Increase.

A mobilehome park owner shall give written notice to the City of a proposed rent increase. The notice shall be given at the same time that the notice of rent increase is given to the tenants. The notice shall be filed with the City Clerk and shall contain the following information: the amount of the current space rents and the amount of separately billed fees or charges, if any; the amount of the proposed increase; the spaces to which the increase applies and the names of the tenants of those spaces; and the date of the last rent increase for the park.

Section 16.16.060. Initiation of Proceedings.

(a) Filing of petition. Tenants of a mobilehome park may initiate Commission review of a proposed space rent increase by filing with the City Clerk a written petition which complies with the requirements set forth in this subsection. The petition shall:

. . .

(3) Be signed by at least one (1) tenant from each of more than fifty percent (50%) of the mobilehome spaces within the park which would be subject to the space rent increase specified in the notice.

. . .

(d) Stay of Space Rent Increase. Unless the City Clerk rejects a petition . . . the filing of a petition pursuant to subsection (a) shall automatically stay the space rent increase subject to the petition until . . .

(2) The Commission makes a final decision regarding the space rent increase pursuant to Sec. 16.16.070.

Section 16.16.070. Commission Review.

(a) Upon receipt from the City Clerk of the petition, the Commission shall schedule a hearing thereon to be conducted no sooner than twenty (20) days and no later than forty (40) days from the date of the Commission's receipt of the petition at a place and time to be set by the Commission. The purpose of the hearing shall be to determine whether or not the rental increase is reasonable.

. . .

(g) The mobilehome park owner shall bear the burden of proving by a preponderance of the evidence that a proposed space rent increase is reasonable and is necessary to enable the mobilehome park owner to receive a just and reasonable return on his investment. . . .

Section 16.16.080. Annual Adjustments.

(a) Except for rental adjustments exempt from this Chapter . . . all space rents in a park shall be adjusted at the same time. A mobilehome park owner shall not increase or adjust space rents more than one time in any twelve consecutive month period.

ORDINANCE NO. 90-862

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA AMENDING TITLE 16, CHAPTER 16.16 OF THE SAN MARCOS MUNICIPAL CODE BY THE ADDITION OF SECTION 16.16.085(C) RELATING TO PERMISSIBLE RENTAL ADJUSTMENTS UPON THE OCCURRENCE OF A SPACE VACANCY

The City Council of the City of San Marcos, California does ordain as follows:

SECTION 1. The Title 16, Chapter 16.16 of the San Marcos Municipal Code is amended by the addition of Section 16.16.085(c) to read as follows:

(c) Establishment of space rent by a rental agreement other than a long term lease which establishes a tenancy exempt from the provisions of this chapter for a new tenant following a vacancy resulting from the sale of a mobilehome on a space subject to the following provisions:

(1) The amount of the space rent established for the new tenant shall not exceed the higher of either: (i) the amount of the preexisting space rent increased by the percentage change of the consumer price index applicable to San Diego County from the time period of the last space rent increase to the date of establishment of the new rent or 10% whichever is less; or (ii) the median rent level for comparable spaces within the park subject to this chapter increased by the percent of change of the consumer price index applicable to San Diego County from a date one year prior to the date of establishment of the new rent or 10% whichever is less.

(2) For the purposes of this subsection comparable spaces within each park shall be determined on an annual basis by the City Council taking into consideration such factors as: space location, size, shape and amenities; proximity of the space to a clubhouse or other recreational facility within the park; preexisting rent levels; and other relevant factors. Comparable spaces and the rent levels for those spaces shall be designated on a map approved by City Council resolution. The map of comparable spaces and showing comparable rents shall be posted in the office of the park manager and shall be available for inspection by residents and prospective residents of the park. The map designating comparable spaces and establishing comparable rent levels shall be updated on an annual basis.

(3) If a mobilehome park owner believes that the amount of the new rent established pursuant to the provisions of subparagraph (1) is less than the fair market rent for the mobilehome space, the mobilehome park owner may request that the fair market rent for the space be established by arbitration. A request for arbitration shall be filed with the City Clerk prior to the commencement of the new tenancy. The request for arbitration shall designate the space within the mobilehome park for which arbitration is requested and shall include the names, addresses, and telephone numbers of the existing tenant and of the prospective tenant. The City Clerk shall notify the existing and the prospective tenants of the request for arbitration by first class mail sent within three days of the date of the filing of the request. The arbitrator shall be selected by

the prospective tenant with the consent of the mobilehome park owner from a list of impartial arbitrators approved by the City Council and kept on file in the office of the City Clerk. The decision of the arbitrator shall be limited to the establishment of the fair market rent applicable to the space. Fair market rent is that rent which would be paid for the mobilehome space in the City assuming normal market equilibrium between the supply of mobilehome spaces in the City and the demand therefor, and without the exercise by the park owner of an unfair bargaining position resulting from the factors which the council found necessitated the adoption of this Chapter. The park owner shall have the burden of going forward with the evidence, but neither side shall have the burden of proof on the issue of fair market rent. The matter shall be heard by the arbitrator and a written decision on the matter rendered within 60 days from the date the request for arbitration is filed. The decision of the arbitrator shall be final subject to review by writ of administrative mandamus. The petition for writ of administrative mandamus may be filed by the park owner, the existing tenant, the prospective tenant, or by the City upon order of the City Council. The cost of the arbitrator shall be borne by the park owner. Each participant in the arbitration shall bear their own costs and expenses of the arbitration.

(4) A mobilehome park owner shall be entitled to only one rent increase per space per year under the provisions of this subsection.

EFFECTIVE DATE: This Ordinance shall be effective thirty (30) days after its adoption. Within fifteen (15) days after its adoption, the City Clerk shall cause this Ordinance to be published in a newspaper of general circulation in the City pursuant to the provisions of Government Code Section 36933.

INTRODUCED AND FIRST READ at a regular meeting of the City Council of the City of San Marcos, California held on the 11th of September, 1990, and thereafter;

PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council of the City of San Marcos, California, held on the 25th day of September, 1990, by the following vote:

AYES: LOSCHER,PRESTON,SMITH,THIBADEAU

NOES: NONE

ABSTAIN: NONE

ABSENT: HARRIS

/s/ LEE B. THIBADEAU
Lee B. Thibadeau, Mayor

ATTEST:

/s/ SHEILA KENNEDY
Sheila Kennedy,
City Clerk

APPROVED AS TO FORM:

/s/ DANIEL S. HENTSCHKE
Daniel S. Hentschke,
City Attorney

(3)

No. 90-1824

FILED
AUG 6 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PALOMAR MOBILEHOME PARK ASSOCIATION, a Limited Partnership,

Petitioner,

vs.

THE CITY OF SAN MARCOS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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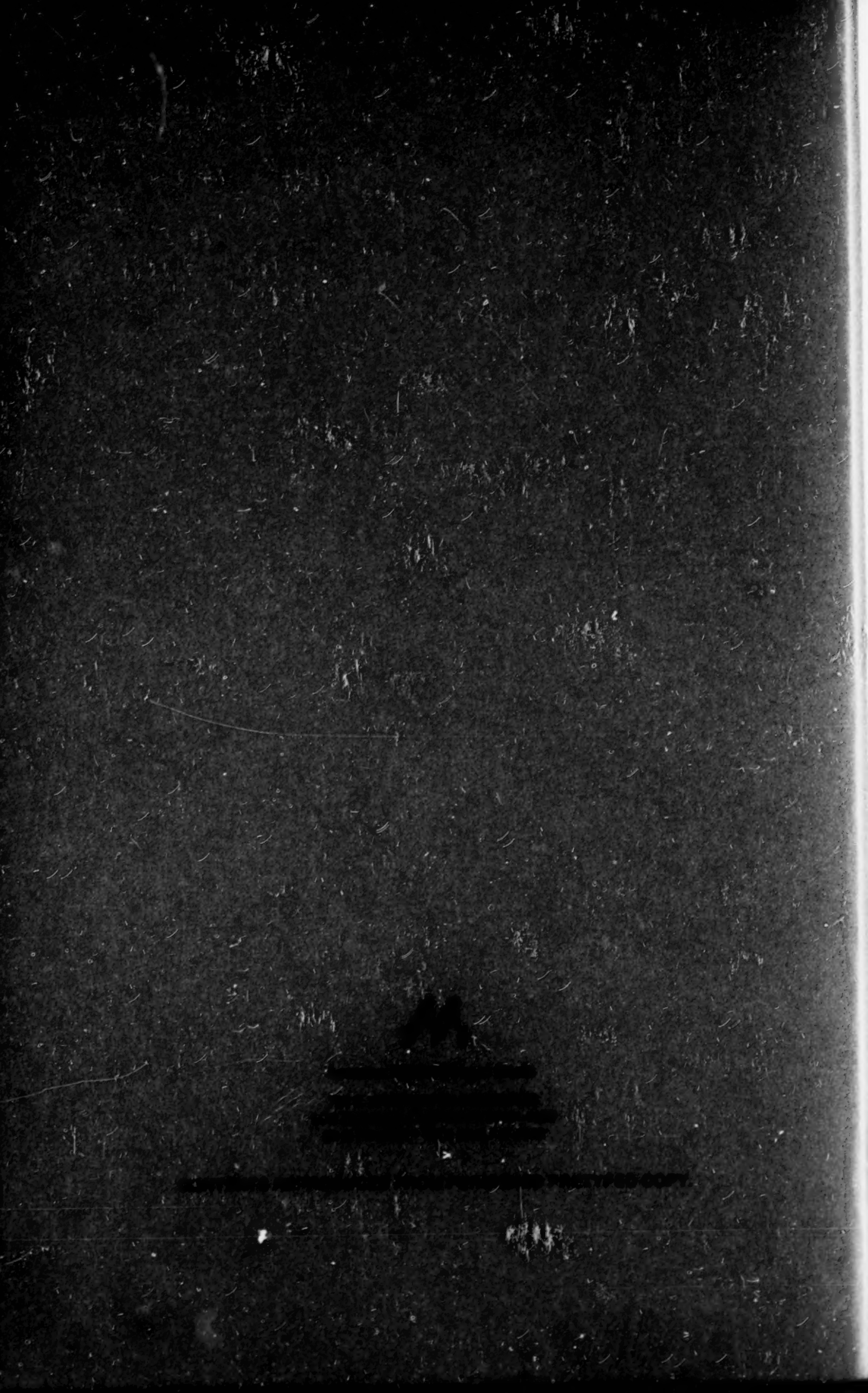

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No. 90-1824

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PALOMAR MOBILEHOME PARK ASSOCIATION,
a Limited Partnership, Petitioner

vs.

THE CITY OF SAN MARCOS, Respondent

PETITIONER'S REPLY BRIEF

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner PALOMAR MOBILEHOME PARK ASSOCIATION hereby replies to the arguments raised in Respondent CITY OF SAN MARCOS' Brief in Opposition filed in this Court in the above matter.

INTRODUCTION

Review by this Court is sought to settle important issues of law on which the California courts are in direct conflict with the Federal courts.

APARTMENT RENT CONTROL IS DIFFERENT FROM MOBILEHOME RENT CONTROL IN CALIFORNIA.

Apartment rent control differs from mobilehome rent control in one very significant way in California. Because

the Mobilehome Residency Laws specifically protect the tenants from eviction of the mobilehome upon transfer and allow the coach to be sold "in-place", subject to approval by the landlord on the basis of the ability to pay[1], the outgoing tenant has significant influence over the identity of the incoming tenant. Prior to the imposition of rent control, however, the landlord's ultimate ability to choose was unimpaired because, as a practical matter, the rent could be raised (or reduced) to any amount as a process of individual negotiation between the Parkowner and the incoming tenant within the confines of the free market.

With rent control, and particularly with "vacancy control", i.e. the prohibition by the City on raising rents

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[1] See Cal. Civ. Code § 798.74, Appendix D to Petition, pp. 44-47.

at the time of transfer or sale, the Parkowner plaintiff is denied of his ability to choose the incoming tenant. He cannot withhold approval if the tenant can pay, and he cannot raise the rent. Effectively, as long as the selling tenant finds someone who can pay the current rent, that person or persons cannot be denied occupancy in the Park.

Thus the landlord is denied important control over the use of his (or her) land. That loss of control over possession is a taking and has been held to be so in Hall v. City of Santa Barbara, 833 F.2d 1270, (9th Cir. 1987) cert. denied 485 U.S. 940 (1988) and Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990).

In apartment rent control, the outgoing tenant has nothing to sell. He or she merely surrenders the unit to the

landlord, who, even if some form of vacancy control prohibits rental increases[2], can exercise full control over the identity of the next tenant. As the Hall court recognized, it is the power to choose who occupies, whether by aesthetic or economic methods, that invokes the Constitution.

> That tenants normally cannot sell their rights in rent controlled property provides important safeguards for landlords. Tenants, like the rest of us, are not immortal; nor are they immune to the normal familial and economic pressures that occasion vacancies even in rent controlled housing. If they are denied the right

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[2] In reality, very few, if any, apartment rent control ordinances in California preclude the landlord from raising the rent once the unit becomes vacant.

to cash out, tenants can enjoy the benefits of rent control only so long as they remain tenants, not beyond. When the premises become vacant, the landlord is able to reassert a measure of control over the property. He may choose to occupy it himself; or to allow a friend or relative to stay there; or to keep it vacant; or make improvements in the hope of raising the rent to the extent allowed by law; or to rent it to a new tenant, presumably making the selection on the basis of factors that will maximize his total return on the property. Between tenants, the landlord can thus assert important prerogatives as property owner and make significant decisions as to the property's use. The tenant, for his part, must make difficult choices: if he wants the

> benefits of the rent control ordinance, he must stay put. If he wants to leave, he must give up a good thing.

Hall, supra, at 1279. (See also fn. 23 at 1279).

The City's citations to Pennell v. City of San Jose, 485 U.S. 1 (1988), Fisher v. City of Berkeley, 37 Cal.3d 644, 209 Cal.Rptr. 682, app. dism. 471 U.S. 1124 (1985), Nash v. City of Santa Monica, 470 U.S. 1046 (1985) and Schnuck v. City of Santa Monica, 935 F.2d 171 (9th Cir. No. 89-55283) (June 4, 1991), all apartment rent control cases, are simply inapplicable in the analysis of the constitutionality of vacancy control provisions of mobilehome rent control laws.

A CHALLENGE TO A RENT CONTROL ORDINANCE AS AN OVER-REGULATORY PRICE CONTROL ON THE BASIS THAT IT CONFISCATES PROPERTY BECAUSE IT DENIES THE OWNER A "JUST AND REASONABLE" RATE OF RETURN IS ENTIRELY DIFFERENT THAN THE CHALLENGE BROUGHT FORTH HERE (AND IN HALL AND PINEWOOD) THAT A PHYSICAL OCCUPATION TAKING RESULTS FROM THE VACANCY CONTROL PROVISIONS OF THE CITY'S MOBILEHOME RENT CONTROL ORDINANCE SUPERIMPOSED UPON EXISTING STATE LAW.

Respondent City of San Marcos as well as the Fourth Appellate Court confuses a challenge to a particular rate under the price control aspects of rent control with the challenge brought by plaintiff in its lawsuit that the ordinance effects a physical occupation taking.

The Hall court addressed the same argument raised by the City of Santa Barbara by saying:

> The adequacy of compensation, if any, paid to appellants is yet another inquiry fraught with factual uncertainty. The city would short-circuit this process by arguing that appellants are adequately compensated because they are entitled to rent that assures them a fair return on their investment. That, however, is not the test in cases involving a claim of taking by physical invasion, as opposed to mere regulation. For example, Mrs. Loretto's claim was not defeated because she continued to collect rents on the apartment building upon which the cable was strung. See Loretto, 458 U.S. at 442, 102 S.Ct. at 3179-80.

Hall, supra, at 1281 (emphasis added).

The Pinewood Court understood the difference when it wrote:

> Overall, we are quite satisfied that appellants have pleaded a cause of action. The operation of the Barnegat Ordinance in connection with state law has created valuable property interests for which appellants have not been compensated. Furthermore, if the rather minor intrusion in Loretto was deemed a physical invasion then the gross intrusion here must be so classified. This is not a case in which a property owner has simply been told that he cannot do something on his property or that he must use his property a certain way. The situation is aggravated by the fact that the transfer is accompanied by the payment

not to the landlord but to the departing tenant of what amounts to rent for the use of the pad. This "rent" is for the possessory interest of the landlord. Thus, this is a case where other persons, tenants, have been granted interests in property which properly belongs to the appellants, the landlords. We acknowledge of course that appellants may receive a constitutionally adequate rent for the occupancy of the tenants as such, but that fact is not material to our analysis for, according to the complaint, they receive nothing at all for the taking of the alienable physical property interest vested in their tenants.

Pinewood Estates, supra, 898 F.2d at 353 (emphasis added).

The California cases cited by the City, Yee v. City of Escondido, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990) rev. den. 01-24-91, and Casella v. City of Morgan Hill, 230 Cal.App.3d 43, 280 Cal.Rptr. 876 (1991) rev. den. 07-17-91, likewise confuse the "fair return" issue with the issue of an unconstitutional transfer of possessory property rights.

As a point of reference, this Court may take judicial notice of two cases currently pending on appeal to the California Fourth Appellate District, Division One, which are legal challenges to the rate of return, Palomar Mobilehome Park Association, dba Palomar Estates East v. Mobile Home Rent Review Commission; City of San Marcos, R.p.i., 4th App. No. DO14563 (San Diego Superior Court Case No. N 48882), and Palomar Mobilehome Park Association, dba Palomar Estates West v.

Mobile Home Rent Review Commission; City of San Marcos, R.p.i., 4th App. No. D014591 (San Diego Superior Court Case No. N 48883). Both cases complain that the City's failure to grant park-wide space rental increases pursuant to Palomar's applications unconstitutionally confiscates its property by denying its regulated enterprise a "just and reasonable" rate of return.

THE CITY'S ARGUMENT THAT F.C.C. VS. FLORIDA POWER CORPORATION "SUPERSEDED" LORETTO VS. TELEPROMPTER MANHATTAN CATV CORPORATION AND "UNDERMINED" HALL VS. CITY OF SANTA BARBARA IS PATENTLY ERRONEOUS.

The City alleges that the Fourth Appellate Court, in rendering the decision at issue here, 'examined Hall and Pinewood Estates v. Barnegat Township, found them unpersuasive and their reliance on Loretto v. Teleprompter Manhattan CATV Corp.

misplaced and superseded by a subsequent United States Supreme Court decision, F.C.C. v. Florida Power Corp., 480 U.S. 245 (1987)'. (Opposition p. 8)

Further the City alleges that 'F.C.C. undermined the Hall rationale by finding no taking where a property owner had voluntarily entered into a lease' citing F.C.C.:

> [I]t is the invitation, not the rent which makes the difference. The line which separates these cases from Loretto is the unambiguous distinction between a commercial lessee and an interloper with a government lease.

F.C.C. at 252-253.

Contrary to the City's arguments (and the Fourth Appellate decision to the extent it relies on F.C.C. for the propositions advanced by the City) F.C.C. v. Florida Power Corp does not provide

negative precedence for this case. In F.C.C., the issue was whether the regulation setting rental rates charged for the already occupied utility poles was unconstitutionally confiscatory because the rates were set too low. The Court, in analyzing whether the utility company was receiving a "just and reasonable rate of return" determined that as there were nothing in the regulation requiring the utility companies to allow the cable companies to use the poles, no right of possession had been transferred and Loretto was factually inapplicable. (F.C.C. 480 U.S. at 250).

Indeed, the Court noted that the analysis in F.C.C. would have been quite different had the cable TV tenants of the rent-controlled power poles subsequently sold the right to occupy the poles to an incoming tenant. As the Court in F.C.C.

said, "nothing in the Pole Attachments Act. . .gives cable companies any right to occupy space on utility poles" and specifically reserved for a later day the question of "what the application of Loretto. . .would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." (F.C.C. 480 U.S. at 251 and fn. 6, 251-253.) Here, as in Hall, the facts are more similar to the facts in Loretto v. Teleprompter (1982) 458 U.S. 419. The vacancy control provisions of the rent control ordinance, enacted upon existing state law (Civil Code §§ 798 et seq), requires the plaintiff landlord to accept the incoming tenant and requires the rental rate not be increased. This results in the unconstitutional occupation of property by "an interloper with a

government license" condemned by Loretto, Hall, Pinewood Estates and F.C.C. by the Court's distinguishing its decision from that in Loretto.

The City cannot make its ordinance constitutional by the mere fact that plaintiff is in the rental business. Although consent was given to occupation of a space by the tenant prior to rent control, just as the concept of "consent" for a prescriptive easement does not automatically create consent to any subsequent users, the consent given by plaintiff to use the space at a particular rent cannot be said to extend to the tenant upon transfer at a fixed rent whom plaintiff does not choose.

CONTRARY TO RESPONDENT'S ASSERTIONS, THE HALL COURT WAS WELL AWARE OF THE OCEANSIDE CASE.

Respondent argues that the six Court of Appeal's judges in the Ninth and Third Circuits were ignorant of the existence of Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (1984) and that the Hall court was wrong in describing the Halls' claim as "novel". (Opposition, at p.11, and fn. 12, pp. 11-12)

Respondent's arguments that the Hall panel was unaware of Oceanside is simply inaccurate. This office was counsel for plaintiffs in the Hall case.

The City of Santa Barbara cited Oceanside to the trial court, again cited it in Appellee's Brief filed in the Ninth Circuit Court of Appeals, and the case was cited as well in Amicus for the City's

Brief. Obviously, the Hall court was aware of the Oceanside case and found it non-persuasive.

The Court was correct that the claim was "novel" when it said:

> In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferrable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others.
>
> This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. . . On the one hand, the landlord loses

> forever a fundamental aspect of fee simple ownership: The right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property.

Hall, at 1278-79, (emphasis added).

The Oceanside case dealt only with the allegation that prices for mobilehomes might increase as a result of the ordinance, raised by amicus. The Court said they would not.[3]

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[3] In the Hall case, at trial on remand, the plaintiff proved that the premium existed, that it had a value of $30,000, and that the departing tenants were experiencing a windfall in the amount of $30,000.

In Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. 772 (C.D.Cal. 1990), the Court awarded compensation in the amount of one million dollars for the unconstitutional effect of vacancy control.

Oceanside was an appeal from a facial attack on the City's mobilehome rent control law in which the trial court had enjoined application and enforcement, holding the ordinance:

> [F]acially unconstitutional because it believed the formula for setting initial rents and providing for adjustments fails to consider the property's fair market value and existing general market conditions and deprives park owners of a fair rate of return on their property.

(Oceanside, at 892-93).

Consequently, the Fourth Appellate Court was concerned with those issues. The confiscation that can occur when a landlord is denied a "just and reasonable" return on property is different than the interest at issue in this lawsuit. (See

Eg. Birkenfeld v. Berkeley, 17 Cal.3d 129, 130 Cal.Rptr. 465, 491 (1976)).

Appellants are not challenging the rate of return on their property, but are challenging the taking of the possessory interest. The analysis is necessarily different.

Moreover, the Court, in a truncated discussion of the analysis of the taking issue (by way of comparison, see the Hall decision encompassing ten pages of analysis) vitiated the factual premise upon which the Hall case is based. The court concluded that the ordinance in question there was:

> [S]tructured to establish a fair base rent which reflects general market conditions and incorporates relevant pricing factors. Rents will not be "reduced more than required for the purposes of police power."

(Oceanside, 157 Cal. App.3d 887, 908).

Further, it is clear that jurists are not in agreement that the Oceanside case decided the issues the City claims it did. The dissenting opinion in Yee v. City of Escondido, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990) specifically addressed this argument in saying:

> The majority criticizes the Ninth Circuit decision in Hall for its failure to cite our earlier decision in Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside [citations] and affirms our continued reliance on '. . .what we assumed six years ago in Oceanside was accepted constitutional principle.' The difficulty, however, with this position is that although the Oceanside opinion discussed a multitude of issues having to do with the Oceanside ordinance dealing with

rent control of mobilehome parks, it did not really address the issue now before us. The only discussion that remotely resembles the issue in this case is entirely contained in a few paragraphs which the majority recites as succinctly concluding the Oceanside ordinance was fairly structured not to reduce rents more than required for the purposes of the police power. Respectfully, these paragraphs do not in any fashion analyze the issue presented here. Consequently, there is nothing in our Oceanside opinion which should be cited on the issue and we should perhaps forgive the Ninth Circuit Court of Appeals for its failure to do so.

Yee, supra, 274 Cal.Rptr. at 558-59 (emphasis added, citations to majority opinion omitted).

THE CONNECTICUT CASES CITED BY RESPONDENT, EAMIELLO AND THOMPSON, ARE NOT RENT CONTROL CASES, AND THEREFORE, NEVER REACH THE ISSUES RAISED BY HALL.

The "premium" that exists under Hall due to rent control should not be confused with the premium which is alleged to have existed as a result of a right to transfer occupancy under Eamiello v. Liberty Mobile Home Sales, 208 Conn. 620, 546 A.2d 805 (1988) app. dism. 489 U.S. 1002 (1989) and Thompson Enterprises v. Merlino, 208 Conn. 656, 545 A.2d 1094 (1988) app. dism., 488 U.S. 1024 (1989). A shorthand method for referring to the latter premium is "in-place" value.

A premium can exist in a mobilehome sale for any number of reasons, four immediately suggest themselves:

1. The premium exists due to the existence of rent control which

enables the outgoing tenant to monetize the right to occupy the space at a reduced rent (thus, enabling the tenant to sell what rightfully belongs to the landlord, i.e., the monetary value of the right to a long term lease at a reduced rent). That premium is condemned by Hall and Pinewood and was never reached by Eamiello.

2. An owner of a park, acting under a "cloud of rent control" (expert testimony at the time of trial of the Hall case on remand established the cloud of rent control), voluntarily keeps rents low, thus enabling the tenant to sell the coach at a premium. There, the proximate cause is the voluntary conduct of the park owner and may not be actionable.

3. The park owner, after years of experience with well-disposed tenants, voluntarily keeps rental rates low, thus enabling the tenant to receive a premium at the time of sale.

4. The existence of a state law permitting the transfer of occupancy (much like the California Mobilehome Park Residency Law), thus enabling the tenant to realize a premium, only so long as the park owner chooses not to raise rents at the time of sale. It is this aspect of the "premium" value, and none other, that Eamiello addresses. This is called "in-place" value.

Expert testimony is required at the time of trial. The expert testimony compares coaches sold in-place in non rent controlled parks against the selling

prices received by tenants selling their coaches in-place under rent control.

Thus, the expert testimony isolates out the variable of rent control because the coach prices compared are in-place. The only variable is the existence or non-existence of a rent control ordinance enabling the tenant to sell for a "greater premium" than that which would exist by virtue of being able to sell in-place.

The proximate cause of a premium is a question of fact to be determined at the time of trial, and not to be resolved summarily by way of disposition on a motion as was done in this case by the California courts. It is an incomplete analysis which claims that Eamiello in any way addresses the premium which was the focus of the Hall and Pinewood decisions.

While there was some restriction on the rentals which could be charged at the

time of sale under Famiello, it is clear from a reading of that statute that the park owner could raise all rents in the park without limitation so that the average value would enable the park owner to capture market value for the space at the time of the sale of a coach. Expert testimony will be offered at the time of trial to prove that if the park owner establishes rent at market levels, that the departing tenant receives only what is rightfully his, i.e., the value of the coach and not the monetized value of the right to occupy the space at a reduced rent premium. Again, these are factual issues to be resolved at the time of trial, and not matters of law to be resolved conclusively against this plaintiff by way of motion.

It should be observed that as long as it is only the California State Mobilehome

Park Residency Laws which are operating (just like the state law in Eamiello), the park owners have not sued and will not sue because they have not been economically harmed. So long as they are free to raise rents at the time of sale, they are free to capture the premium which would otherwise exist, and it is only the transfer of that right with its premium value to the departing tenant which creates a cause of action under Hall.

The Connecticut Court in Eamiello specifically acknowledged, "Unlike the ordinance in Hall v. City of Santa Barbara, our statute does not provide for rent control and limit the owner to a below market income." (546 A.2d 805, 820).[4]

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[4] The district court in Gibbs v. Southeastern Inv. Corp., 705 F.Supp. 738, 743 (D. Conn. 1989) made the distinction clear when it said: "Hall is not controlling authority for the instant case

It is precisely the provision in the ordinance for below market rents which enable the tenants to monetize their rent savings upon the time of sale of their mobile homes, and it is this transfer of wealth which is condemned by Hall and regarded as a taking by both the Ninth and Third Circuit Courts[5].

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because . . . the ordinance challenged in Hall provided for rent control in addition to limiting park owners' right to evict. Accordingly, the claim in Hall involved more than the statutory grant of a perpetual lease; it involved the right to a perpetual lease at a below market rental rate . . . a situation readily distinguishable from the instant case in which no rent control provisions are involved."

[5] Reconciling Eamiello with Hall supports the plaintiff's case. Eamiello supports the proposition that the California Mobilehome Park Residency Law (which is strikingly similar to the Connecticut law) is constitutional standing alone. Hall establishes that when rent controls like those in the City of Santa Barbara or the City of San Marcos permit tenants to capitalize their rent savings and sell them to others, an interest in property is taken from the owner, and transferred to the resident.

Further, it should be noted that the "monopoly" referred to in Eamiello (See Opposition p. 20) was, as a matter of fact, applicable in Connecticut because of "zoning ordinances that bar the establishment of new mobile home developments". (See Eamiello, supra, at 820). In California, quite the opposite situation exists. New mobilehome park development is encouraged and the Mobilehome Residency law (Cal. Civ. Code §§ 798 et seq) specifically exempts newly constructed mobilehome parks from local rent controls.

Thus, when a state law provides certain protections which may be constitutional, and a local government controls rents rendering the entire scheme unconstitutional, it is the local regulation, not the state law, which is unconstitutional. It is the totality of the regulatory scheme and the last act (rent control) which results in the taking which is actionable.

THE U.S VS. SPERRY CASE IS SIMPLY INAPPLICABLE HERE--PLAINTIFF COMPLAINS OF MORE THAN A LOSS OF MONEY.

Respondent City's citations to U.S. v. Sperry, 493 U.S. 52 (1989) do not aid its argument that Hall is no longer viable. To analogize plaintiff's complaint to the Sperry case which upheld a reduction in a monetary award, simply because the Sperry plaintiffs asserted a physical taking, is preposterous and underscores the City's cavalier attitude toward property rights.

The taking complained of here is of the possessory right to occupy at a reduced rate which is transferred to the tenants and, under vacancy control, can be subsequently sold to a third party in derogation of the landowner landlord's rights. Money is not the interest. The premium received by the outgoing tenant for the right to occupy at a reduced rate,

as outlined in the Hall decision and determined by the Hall District Court on remand, and in Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. 772, 778-779 (1990), is merely the measurement of the value of the property interest sold.[6]

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[6] Oddly enough, the Hall decision has proven a boon for incoming tenants. While rents were increased approximately $300 per month for a space, the purchase price of coaches reflected their actual worth (used coaches on a dealer's lot are almost worthless), and tenants are now able, and in fact have, purchased coaches in Mrs. Hall's park for sums in the range of $10,000 to $35,000 - instead of a prior range of $50,000 to $87,000. For example, the incoming tenant who purchases an $87,000 coach for $35,000 saves approximately $52,000, with a financing cost savings of $520 per month. The payment of the additional $300 per month leaves the incoming tenant with a net saving of $220 per month.

The outgoing tenant gets what is properly his, i.e., his "equity" in a depreciating asset that depreciates like a used car. What he cannot get is a "disguised equity" which really represents a transfer of a portion of the value of the wealth of the underlying land to the outgoing tenant.

Approximately 46 states, without the dubious benefits of rent control, manage to provide an free market

ANY DIFFERENCES BETWEEN THE SANTA BARBARA ORDINANCE AND THE SAN MARCOS ORDINANCE ARE IRRELEVANT TO THIS CASE.

Respondent City claims that the rent control ordinance creates no possessory interest because the rent control ordinance, unlike Santa Barbara's ordinance, does not require the delivery

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environment in which thousands upon thousands of mobilehomes are routinely sold without creating a windfall for the departing tenant or causing the unnecessary loss of the departing tenant's "equity." Once rent control is set in place, and successfully challenged, the market in then in a state of confusion until it recognizes the true value of the rights being transferred, at which time the tenants often act like economically reasonable people and are willing to pay a fractional increase in rent for a dramatic decrease in the price of an artificially inflated coach.

In the Azul Pacifico case, depositions revealed that at least one tenant paid $75,000 for a "junk coach" which she promptly scrapped upon a trade-in for the sum of $5,000. At her deposition she testified she was not buying the coach, but the space. That, as a matter of fact, is what occurs under rent control in a mobilehome park context.

of a written lease. The distinction is one of form but not substance.

In Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. 772 (1990), the Central District court, itself being the District Court in the Hall case, and having dealt with the issues raised therein for five years, rejected arguments by the City of Los Angeles that the Ordinance in the City of Santa Barbara was so distinguishable as to make Hall inapplicable and that the taking was effected by the State Mobilehome Residency laws, Cal. Civ. Code §§ 798 et seq.

> The City argues that it is not the RSO [Rent Stabilization Ordinance] which forces a landlord to offer a tenant a lease of indefinite term, therefore this Court cannot find the ordinance to be unconstitutional. The City made this argument during

> pretrial motion practice and it is no more convincing now than it was then. In this Court's Memorandum of Decision Re: Defendant's Motion to Dismiss, filed December 2, 1987, this Court wrote, "[t]he Los Angeles Rent Control Ordinance does not operate in a vacuum. Presumably the drafters of the ordinance knew of the state statute when the ordinance was enacted. The combination of the ordinance and the state statute, as alleged in the complaint, caused the effect articulated in Hall, specifically that the limitation on rents under the ordinance allows a tenant to sell a mobile home at a premium.

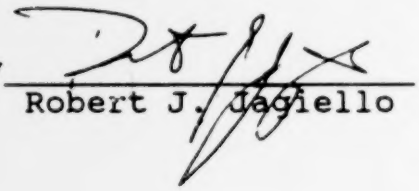
Azul Pacifico, 740 F.Supp. 772, 775-76.

IN CONCLUSION

Petitioner respectively requests the Petition for Writ of Certiorari be granted and the case set for further briefing.

Dated: August 1, 1991

Law Offices of Jagiello & Pech

By 
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